No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1947

MARIANNA VON MOLTKE, PETITIONER

v.

A. BLAKE GILLIES, SUPERINTENDENT OF THE DETROIT HOUSE OF CORRECTION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the district court (R. 170–174) is not reported. The majority and dissenting opinions in the circuit court of appeals (R. 182–198) are reported at 161 F. 2d 113.

JURISDICTION

The judgment of the circuit court of appeals was entered March 10, 1947 (R. 181). The petition for a writ of certiorari was filed April 24, 1947, and granted June 2, 1947 (R. 199). The jurisdiction of this Court rests upon Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the district court was warranted in finding from the evidence adduced at the habeas corpus hearing that petitioner failed to sustain her burden of proving that she did not freely, intelligently, and knowingly waive her right to the assistance of counsel, and that she did not freely, intelligently, and knowingly plead guilty.

STATEMENT.

On September 17, 1943 (see R. 17), an indictment was filed in the District Court for the Eastern District of Michigan charging that petitioner and others conspired to transmit to the German Reich materials and information relating to the national defense of the United States with the intent that they be used to the injury of the United States, and to collect and publish information in respect of the movement and disposition of the armed forces, ships, aircraft, and war materials of the United States with intent to communicate such information to the German Reich, in violation of Sections 2 and 4 of the Espionage Act of June 15, 1917, Title I, c. 30, 40 Stat. 217 (50 U. S. C. 32, 34). Forty-seven overt acts were alleged, of which five (Nos. 24, 29–32) concerned petitioner. Four of these five (Nos. 24, 30–32) charged that petitioner met and conferred with

one or more of the other defendants on designated dates; the other (No. 29) charged that petitioner introduced one Arndt to another defendant. Each overt act was specifically alleged to have been committed "in pursuance of said conspiracy and to effect the object and purpose thereof." (R. 20–34.)

Petitioner was arraigned on September 21, 1943; on the advice of an attorney appointed by the court for the purposes of arraignment only, she stood mute, and a plea of not guilty was entered on her behalf (R. 10–12, 47, 110–113). On October 7, 1943, petitioner signed a waiver of her right to counsel (R. 36), withdrew her plea of not guilty, and entered a plea of guilty (R. 35).

On August 7, 1944, petitioner, through counsel, filed a motion for leave to withdraw her plea of guilty and enter a plea of not guilty on the grounds that she was not guilty of the crime charged, that her plea of guilty was made "under circumstances of extreme emotional stress and during a time of extreme mental disturbance, without knowledge of her legal rights and without a thorough understanding of the nature of the offense charged," and that the acceptance by the court of her plea of guilty when she was without counsel violated her right to counsel under the Sixth Amendment (R. 37). Petitioner also filed an affidavit in support of this motion (R. 38–45).

Following a hearing,[1] the motion was denied by Judge Moinet, who found that petitioner was properly advised of her constitutional rights by the court both prior to and at the time she entered her plea of guilty, that the plea was submitted after due and careful deliberation, that petitioner was advised of and thoroughly understood the nature of the charge contained in the indictment, that the plea was not due to any promises or misrepresentations, and that the motion for leave to withdraw the plea was not filed within the ten-day period prescribed by Rule 2 (4) of the Criminal Appeals Rules (18 U. S. C., following § 688), which were then in effect (R. 46–47).

On November 15, 1944, petitioner was convicted on her plea of guilty and sentenced to imprisonment for four years (R. 8–9). No appeal was taken.

Fifteen months later, on February 7, 1946, petitioner filed in the convicting court a petition for a writ of habeas corpus, alleging that her imprisonment was illegal in that she had been denied the assistance of counsel for her defense and had been coereed, intimidated, and deceived into pleading guilty, in violation of her constitutional rights (R. 1–7). The writ issued (R. 15–16) and a hearing was held at which the following testimony was adduced:

[1] The present record does not contain the proceedings at this hearing. It is stated in petitioner's brief that no testimony was taken at the hearing (Br. 11). But the judge considered the affidavits on each side (cf. R. 149, 156, 146).

A. *The undisputed evidence.*—Petitioner was the wife of an instructor of German at Wayne University and has lived in the United States since the end of 1926 (R. 2, 48, 70). In addition to her household duties she was a member of the Red Cross and the local Parent-Teachers Association, engaged in social work at the Y. W. C. A. International Center, and participated in such voluntary work as gasoline and sugar rationing (R. 89–90).

On August 24, 1943, she was arrested on a presidential warrant as a dangerous enemy alien and detained at an Immigration Detention Home (R. 48–50, 126). From August 24 to August 27 she was questioned by two agents of the Federal Bureau of Investigation, Collard and Hanaway (R. 49, 95, 121, 126–127, 143), and she gave them a signed statement (R. 55, 143). She was not thereafter questioned about the case (R. 95, 143). Both of the agents were courteous and friendly (R. 49).

On September 18, 1943, a copy of the indictment involved in the present proceeding was handed to petitioner, and she read it (R. 50). On September 21 she and another woman defendant were brought before Judge Moinet for arraignment. The judge informed them that they were entitled to counsel, and when they said they had no money for counsel, he stated that he would appoint counsel for them (R. 51). The court

designated an attorney in the court room to represent them, but, when the attorney stated that he did not wish to be in the case, the judge appointed him for the purpose of arraignment only (R. 51, 110–111). The attorney engaged in a whispered conversation with the women and advised them that it would be to their advantage to stand mute rather than plead not guilty (R. 51–52, 111–112). On his advice, they stood mute and the court entered a plea of not guilty in their behalf (R. 52–53, 112).

Petitioner was then taken to the Wayne County jail (R. 53). Two other women named as defendants in the indictment occupied the same cell block (R. 53). Two other agents of the F. B. I., Kirby and Dunham, came regularly to the cell block to interrogate one of the other women, Mrs. Behrens, and Hanaway also came there occasionally. Petitioner frequently engaged in conversation with these agents. (R. 53–54, 122, 134, 147.)

On September 25, Okrent, an attorney who had been a pupil of petitioner's husband, and Okrent's partner, Berger, called on petitioner. They told her they had come at her husband's request and would let her husband know whether they would take the case. They conversed with petitioner for about 2½ hours. (R. 56–57, 91–93, 114–118.)

Either on September 27 or October 2, petitioner asked Collard, one of the F. B. I. agents who had taken her statement, to call on her, and Collard did so (R. 54, 56, 140). She questioned him about

the indictment and he attempted to explain it to her (R. 55, 75, 140).

On September 28 petitioner, on her own initiative, told Hanaway, another F. B. I. agent, that she would plead guilty if she would receive assurances that there would be no more publicity, that she would not be sent far away from Detroit, and that she would not be deported (R. 58, 99–100, 122). Hanaway said that he would relay her message to the Assistant United States Attorney, Babcock, who was in charge of the case (R. 58, 100, 123). Petitioner saw Babcock on September 28 in the Marshal's office and repeated those conditions to him (R. 58, 101, 124, 158–159). Babcock stated that he had no control over the matters presented by petitioner but that he would recommend that she be incarcerated near Detroit (R. 58–59, 101, 159). Babcock told her that the question whether to plead guilty or not rested with herself alone and that he was not permitted to influence her (R. 101, 159). She told Babcock that she was not ready to plead guilty that day (R. 60, 125). At her request she had conferred with her husband in the marshal's office, and her husband had asked her not to do anything before she saw a lawyer (R. 60, 103, 148).[2]

[2] After first denying that her husband had received any education in law, petitioner admitted that he had received "a certain amount of education in German law before the first World War" (R. 97).

On October 7, petitioner decided to plead guilty (R. 63, 65). She was brought before Judge Lederle (R. 65, 138–139). The judge at first demurred at accepting her plea because there had been an appearance of counsel in the case, but according to petitioner Babcock assured him that he could accept the plea (R. 66). Petitioner then signed a written waiver of counsel (R. 66–67) reading as follows (R. 36):

> "I, Marianna von Moltke, being the defendant in the above entitled cause, having been advised by the Court of my right to be represented by counsel, and having been asked by the Court whether I desire counsel to be assigned by the Court, do hereby, in open court, voluntarily waive and relinquish my right to be represented by counsel at the trial of this cause.

The judge asked her whether the indictment had been explained to her and she said "Yes" (R. 67–68, 107, 139). The judge asked her whether she was pleading guilty because she felt she was guilty and she replied in the affirmative (R. 68, 107–108, 139).

Petitioner admitted that the agents never threatened her or made promises to her to induce her plea of guilty (R. 99) and the agents testified that they made no threats or promises of any kind to induce her to plead guilty (R. 121, 131, 133, 136, 147).

B. *The conflicting testimony.*—The circumstances surrounding the succession of events set forth above were the subject of sharply conflicting testimony.

1. *Petitioner's understanding of the indictment*

Petitioner testified that she read the indictment when it was handed to her but did not understand it (R. 50).

The attorney who represented her at the time of arraignment testified that he talked to petitioner and the other defendant for a few minutes, that he asked them both "whether they understood what this was all about." One of the women said "yes, they did understand, and the other indicated that she, too, understood" (R. 111).

On cross-examination of petitioner the following occurred (R. 90-91):

> Q. Mrs. von Moltke, when you were served with the indictment in this case, did you read it?
>
> A. I read it.
>
> Q. And after you had read the indictment, did you feel you were innocent of the charges that were stated in the indictment?
>
> A. Yes, sir, definitely so.
>
> Q. You did not feel you were guilty of those charges that you read in the indictment?
>
> A. I did not feel guilty of those charges in the indictment.

Q. Then you knew what the charges were in the indictment.

A. Oh, no, and so far I might explain that to you, I knew——

Q. Just answer my question.

The COURT. Answer the question.

A. Yes, I knew, not what the charges were, but I knew as I said before that I saw I was accused of something of which I was not guilty. That was how I understood that.

Q. Well, you read the indictment. Isn't that right?

A. I read the indictment.

Q. And you felt you were innocent of the charges that were described in the indictment?

A. And the overt acts.

Q. And the overt acts?

A. Yes.

2. *The visit of attorneys Okrent and Berger*

Petitioner testified that when Okrent and Berger called on her on September 25 at her husband's request, she discussed only family affairs with them, that she talked only to Okrent, and that Berger "was just sitting there" (R. 92–95). She said that Okrent asked her if she was to have counsel and that she replied that Judge Moinet was going to appoint counsel for her (R. 93).

Berger took the stand on petitioner's behalf. He testified that he and Okrent, an associate in

his law firm, went to see petitioner at the request of her husband (R. 114). While Okrent "did most of the talking," Berger also talked to petitioner (R. 114). He interrogated petitioner as to the charges that had been made against her (R. 114), and examined her insofar as the indictment affected her (R. 119). He would read to petitioner parts of the indictment referring to her, and put her through "a form of cross-examination" (R. 119). The purpose of the interview was to discuss "this case" with her, and not family matters primarily (R. 118). Petitioner talked about her family affairs, such as how her husband "was getting along, and whether he would be reinstated," etc. (R. 117), but also talked "About this case, about the indictment, or the conspiracy under the Espionage Act. We wanted to know the whole story, and I presume she told us" (R. 115). The discussion "was all around the case, and the incidental phases of the case" (R. 119). The "question of pleading guilty came up" and Berger told her "if you are guilty, plead guilty; and if you are not, do not" (R. 120). The attorneys made it clear, however, that they were not acting as attorneys, but merely as friends of petitioner's husband (R. 116).

3. *The discussions with the F. B. I. agents*

Petitioner testified that between September 23 and the time of her plea of guilty the F. B. I. agents visited her cell block daily, and that after ques-

tioning Mrs. Behrens, a codefendant, they would engage in conversations with the women concerning "things of interest" such as the "hostile publicity, and sentiment, and cost of the trial, and the inquisition of the Federal Judge, and the—oh things which were in the interest of the trial, and our present state" (R. 53–54). On one of these occasions, petitioner testified, she asked Dunham, "Is it really so bad, that the public is so hostile?"; "* * * if we go to Court, will we be bodily attacked?" Dunham replied "It is war time—you have to bear that in mind. Public sentiment grows from war hysteria. You don't need to be afraid; you will be protected." This left her with "the thought that it is terrible to go to court and face a hostile public." (R. 82–83). On another such occasion, petitioner said, she heard Kirby tell Mrs. Behrens, who had pleaded guilty, that "the other defendants" in the case would plead guilty the following week; petitioner asked Kirby whether, if the other defendants pleaded guilty, she would "get a trial for myself"; Kirby replied that he "could not answer this question because he did not know if this would be all right with the prosecuting attorney" (R. 85).

Dunham, Kirby and Hanaway testified that they did engage in conversation with the three women defendants (R. 122, 134, 147). Hanaway testified that he was present in petitioner's cell block on only a few occasions and that at such times there was "general discussion among the

three ladies" which "centered about whether they were going to plead guilty, or they were going to trial, or what was going to happen." "They were all trying to make up their minds." Hanaway told petitioner that "if she felt that she were innocent in her heart she should under no circumstances plead guilty." (R. 122.) On one occasion petitioner asked him to explain the indictment to her, and he refused, saying, "Mrs. von Moltke, I am not a criminal attorney, and I do not want to attempt to explain this indictment to you." He further told her that "she should either have her attorney, or the United States Attorney explain it to her." (R. 121, 129.)

Dunham testified that petitioner kept "endeavoring to get advice or information from me, or opinions," but that he declined to advise her (R. 151). She avidly read newspaper items concerning her case and "made many insinuations" on the basis of them (R. 151–152). She asked him "what her chances were in case she went to trial," and he told her he could not answer. She "went so far as to ask me if I could cite a similar case and advise her what the outcome was and I told her I could not." (R. 152.) She asked him if he knew whether Dr. Thomas, a co-defendant, would plead guilty or not, and he told her he did not know. He finally "came out and told her she should discuss this with an attorney." (R. 153.)

On one occasion, Dunham testified, petitioner inquired of him as to the nature of the charge against her, and he told her that he "couldn't explain the indictment to her or talk to her about it," and that he "would advise her to discuss the matter with an attorney" (R. 147). Dunham testified that he never advised or suggested to petitioner that public feeling was running high in connection with the cases in which she was involved (R. 154).

Kirby testified that when petitioner asked him whether she would have the right to a trial if the other defendants pleaded guilty he told her that "the question of the trial would be up to the United States Attorney's Office," and that he might have told her that he "knew of no reason why she should not be tried without the others" (R. 134–135).

4. *Collard's advice*

In regard to her conference with Agent Collard, petitioner testified that about September 27, she asked to see him because she wanted "some information as to the indictment. I didn't understand that" (R. 55, 56). She said she believed Collard was qualified to explain the indictment to her because she knew he was a lawyer (R. 56). She said she told Collard that he had taken her statement and knew that "I didn't do those things which are called 'Over' Acts." (R. 55.) Collard told her

that the indictment did not "cover the charge" (R. 55), that it did not "mean much of anything" (R. 76), that "those charges don't mean a thing" (R. 77). According to her testimony, he then explained the indictment to her "by an example which he called the 'Rum Runners,'" and which she understood as follows: "* * * if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still * * * this plan is carried out, in the law the man who was present * * * nevertheless is guilty of conspiracy." She then told Collard, "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?" Collard, petitioner testified, then explained about the "Probation Department" and its functions. (R. 55.) At another point, petitioner testified that she told Collard that since he had taken her statement he knew that she was never in Grosse Pointe where one of the overt acts naming her was alleged to have occurred, and that she had "nothing to do with all the people named here" (R. 64–65, 75–76). It was after these statements, she testified, that he gave her the rum runners' illustration (R. 76).

Collard testified that on October 2 he received a message that petitioner wanted to talk to him.

When he visited petitioner she had a copy of the indictment that had circled the various "counts" that mentioned her (R. 140, 142). He talked with her for several hours and explained the nature of conspiracy to the best of his ability (R. 141–143). The following occurred on Collard's cross-examination (R. 142–144):

> Q. And did you during that discussion use an illustration about a rum runner?
>
> A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.
>
> Q. I see.
>
> A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration.
>
> * * * * *
>
> Q. (By Mr. FIELD): Did Mrs. von Moltke ask you the difference, or to define the difference between a combination, a conspiracy, and a confederation?
>
> A. I am sure I don't know whether she asked me such a question or not.
>
> Q. You don't recall that?
>
> A. No, I don't believe I do.
>
> Q. Did you discuss with Mrs. von Moltke whether she introduced one Edward Arndt to Grace Buchanan Deneen?
>
> A. This is on the occasion of October 2?
>
> Q. October 2, 1943.
>
> A. I will have to answer that by saying that if that is one of the Overt acts in-

volving Mrs. von Moltke, then I did discuss it with her.

Q. And did you explain to Mrs. von Moltke the nature of an Overt act?

A. Well, if she asked me, I probably tried to, but whether she asked me or not I just don't remember.

Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible.

Collard testified that he did not indicate to petitioner the course she should pursue (R. 144). He testified that he told her that the question of whether she should plead guilty "was a matter strictly for her, and for nobody else" (R. 137). He reaffirmed the statement he had made in opposition to petitioner's motion to withdraw her plea that the plea was "her free and voluntary act made after due consideration with a full and complete understanding of the charge made against her in the indictment in the instant case" (R. 146). He said on the stand that "As far as I knew and could understand, she understood thoroughly what the whole thing was all about" (R. 147).

On cross-examination petitioner testified as follows (R. 91):

Q. Now, after you talked to Mr. Collard, did you still feel you were innocent of those charges?

A. Yes, sir, because I told Mr. Collard so.

Q. After Mr. Collard had explained the indictment to you, did you still feel you were innocent of the charges described in the indictment?

A. I told Mr. Collard so, and I could not go outside of the fact of the rum runners—

Q. Regardless of what Mr. Collard told you, you still felt you were innocent of the charges in the indictment?

A. Yes, sir.

In response to a question from the bench, petitioner admitted (R. 75) that no government official told her that she had to prove her innocence.

5. *The September 28th conference with Assistant U. S. Attorney Babcock*

Petitioner testified that on September 28, when she first said she was going to plead guilty, she told Hanaway, "As the matter stands, and as I understand the situation, I am supposed to plead guilty." She told him she was "willing to cooperate" but wanted her conditions met (R. 58). On cross-examination she admitted that she initiated the discussion of her plea of guilty (R. 99–101). She further testified that she told Babcock that she understood the situation and

knew that he wanted her to plead guilty, but that if she pleaded guilty it was only "to cooperate" and not because she was guilty (R. 58). She also testified that while Babcock gave her no guarantees, he told her he did not believe she would be deported and that they were "human" (R. 58–59, 102–103). She testified that she did not plead guilty on September 28 because "The answer Mr. Babcock gave me was not fully satisfactory" (R. 103), and because her husband, whom she had seen that day, asked her not to do anything without consulting a lawyer (R. 60, 103–104). She therefore told Babcock she wanted "to think the whole situation over" (R. 60).

Hanaway testified that he could not recall petitioner saying that she was pleading guilty because she wanted to cooperate (R. 123–124). All he recalled were the three conditions upon which she wished to predicate her plea (R. 123). He testified that he conveyed petitioner's conditions to Babcock, and that Babcock told him he had no control over those matters but that he would recommend that petitioner be sentenced to an institution near Detroit since her child was ill, emphasizing, however, that his recommendation would not be binding on the Bureau of Prisons (R. 123). Hanaway testified that he conveyed Babcock's message to petitioner (R. 123–124), and that subsequently Babcock repeated the same statements to petitioner in stronger form, pointing out that he did

not know how long he would be an Assistant United States Attorney (R. 124–125). Babcock made it very clear that petitioner's plea of guilty would have to be independent of any of the conditions which she expressed to him (R. 124, 125). Babcock also told petitioner she should not plead guilty unless she was guilty (R. 125).

Babcock testified that he told petitioner that he had no control over the newspapers, that he could do nothing about deportation, since that was a question for the Immigration and Naturalization Service to determine, and that, although he could not control the place of incarceration, he would recommend that she be imprisoned near Detroit where her family might see her (R. 159). He told her that "under any circumstances anything I might reply to her questions must not have any bearing whatsoever upon her decision to plead guilty or not plead guilty; that she would have to decide that for herself, on the basis of whether or not in her own conscience she had to say that she was guilty" (R. 158–159). He vigorously denied that petitioner had at any time told him she was pleading guilty in order to cooperate, or that she was pleading guilty even though she was not guilty (R. 159).

6. *The period between the September 28th conference and petitioner's plea on October 7th*

Petitioner testified that between September 28 and October 7, as a result of something said by

Mrs. Behrens, she began to fear that if she did not "fall in line and plead guilty" her husband would be implicated. She asked Collard if that was true and Collard said that he couldn't answer that question (R. 60–61).[3] She further testified:

> I asked Mr. Collard, "Do you think that in my statement I told the truth?" Mr. Collard said, "Mrs. von Moltke, I know—we know—you told the truth." And I asked Mr. Collard what does the FBI think—is my husband telling the truth? And he said, "Yes, we know that he is telling the truth." Later on I talked to Mr. Dunham, and he said they know my husband would tell the truth whether he hurts himself, or me, or anybody else. But as to this question, I felt that there was some proof in it.

Petitioner also testified that while the F. B. I. agents asked her whether she had seen an attorney (R. 84, 104), none of them ever told her that she should get advice from an attorney (R. 85, 96).

Kirby testified that when the subject of whether she should plead guilty or not came up on one occasion following her conference with Babcock

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[3] In her affidavit in support of her motion of August 7, 1944, for leave to withdraw her plea of guilty (see p. 3, *supra*), petitioner stated that "she asked Mr. Collard whether her husband was in any way involved in the matter, and that Mr. Collard replied to her that he was sorry but that he could give her no information concerning that fact, and that although at present she realizes that that was a perfectly proper and normal answer, at the time it was given to her, because of her state of mind, this was confirmation of the statement made to her by Mrs. Behrens" (R. 40–41).

on September 28, he told her that "that would be a question for her to decide, or her attorney, as we had understood from Mrs. von Moltke that Mr. von Moltke was interested in obtaining an attorney for her." At this suggestion, petitioner "jerked her shoulders, and said she was not interested; that she wanted to make up her own mind." (R. 131–132.) On another occasion petitioner inquired of Kirby whether a plea of guilty on her part would bar her husband from being reemployed. He replied that "that was a matter * * * between the University and himself, and the question of her plea was one that she had to decide, based upon her own feeling of guilt or innocence." (R. 135.)

Hanaway testified that on one occasion, when petitioner asked him to explain the indictment to her, he told her that she should have either her attorney or the United States Attorney explain it to her (R. 121, 129).

Collard testified that he told her she "could see an attorney at any time, that that was her privilege" (R. 140) and that she told him that she did not want an attorny (R. 137). He testified that "In all the conversations that I had with Mrs. von Moltke concerning the attorney, it was her idea that she did not want an attorney, and that she wanted to just go ahead without an attorney, and do whatever she was going to do without one" (R. 137).

Dunham testified that when petitioner questioned him about the indictment and about whether Dr. Thomas, a codefendant, would plead guilty he "finally came out and told her she should discuss this with an attorney" (R. 153). She told him that her husband was determined that she have an attorney but that she didn't want to discuss the matter with an attorney, that "it was a problem she wanted to decide herself." She said she didn't feel an attorney would be of much assistance to her "because her consideration was not only for herself, but for her husband and family" (R. 147–148). Petitioner said that her visits with her husband were unpleasant because he wanted her to have an attorney but she was determined to make up her own mind (R. 148).

On cross-examination petitioner was questioned about her decision not to plead guilty on September 28. The record reveals the following (R. 103–104):

> Q. And your husband told you not to plead guilty?
>
> A. He did.
>
> Q. He told you to get a lawyer?
>
> A. Yes; he said I should not before I have seen an attorney; on such a question I should talk to an attorney first about the whole thing.
>
> Q. Then you knew at that time that you were entitled to a lawyer before you pled guilty, if you wanted one?

A. I did not. I just was wondering about the lawyer who never came.

Q. Well, you knew at that time, did you not, that you did not have to plead guilty if you did not want to? Yes or no?

A. No.

Q. Your husband told you to get a lawyer, didn't he?

A. My husband said to wait until a lawyer comes out.

Q. And you decided not to plead guilty because of that?

A. Because of that, yes.

Q. And you went back to the County Jail?

A. And the answer Mr. Babcock gave me was not fully satisfactory.

Q. At any rate, you decided not to plead guilty because of what your husband told you?

A. Yes.

Q. Did you see your husband about getting a lawyer before you pled guilty.

A. No, sir, I pled guilty, and my husband even did not know it.

7. *The events of October 7th, when petitioner waived counsel and pleaded guilty*

On October 7, petitioner decided to plead guilty (R. 63). She testified that Collard "came in just to see how I felt about it, and whether I had seen a lawyer, because I said I wouldn't decide before I had seen a lawyer" (R. 65). She told Col-

lard and Hanaway, who was with him, that she wished to "go with them to plead guilty." They asked her "whether I had seen my lawyer, and whether I had thought about what I was going to do." She stated that she replied, "I wish I would know whether that is the right thing, if I go and plead guilty." One of the agents—she could not remember which—then remarked, "At least it might be the wisest thing." (R. 63, 64.) She was then taken to Babcock and again told him she was ready to plead guilty. She testified that she repeated to him that her plea would be made even though she still felt she was not guilty (R. 65). Babcock accordingly took her before Judge Lederle because Judge Moinet was not in court that day (R. 65).

Petitioner testified as follows relative to the proceedings before Judge Lederle: "Mr. Babcock handed the judge what I would call a folder, and Judge Lederle looked into that and said he could not accept the change of plead because there was something about an attorney— * * * I understood that he said there was to be appointed an attorney in this case, or there was appointed an attorney in this case, or there was to be present an attorney—but I knew distinctly the judge said he could not accept the change of the plead, and Mr. Babcock explained to him that this was different, and that he could accept the change of the plead" (R. 66). Judge Lederle asked her if the

indictment had been explained to her, and she replied in the affirmative, though according to her testimony it "had not been fully explained" to her (R. 67–68). He also asked her if she was pleading guilty because she felt she was guilty, and she said, "Yes," though according to her testimony this was not true (R. 68). A "note" was handed her to sign and according to her testimony she objected because it mentioned something about a trial, but Babcock told her it was all right to sign it and she did so (R. 66–67). On cross-examination, petitioner testified that (R. 106) "I was so confused, and so nervous I did not hear what the judge said."

Hanaway denied that he told petitioner that it would be wiser to plead guilty (R. 124–125).[4] Babcock denied that petitioner ever stated to him that she wanted to plead guilty although she was not guilty (R. 159), and Collard, who was present at the interview with Babcock on October 7, stated that he was "absolutely positive" that petitioner did not make such a statement to Babcock (R. 138). Furthermore, Collard testified, petitioner did not state that she wanted to plead guilty in order to cooperate; she said she wanted to plead guilty because she was guilty (R. 138). Babcock told petitioner that Judge Moinet, the judge who was handling her case, was not available on that day and that it would be much more convenient to wait

[4] Collard was not questioned about this incident.

until another time, but petitioner said she wanted to enter her plea "right then" (R. 138).

Babcock testified that after petitioner announced to him her decision to plead guilty, he "recounted to her the normal procedure in the court room, telling her that when you appear before one of the United States District Judges, the Judge would ask if she was tendering her plea as a result of any promise made to her, whether it was a result of any threats upon her or whether it was because she was guilty. That he would also ask her if she desired to have counsel appointed to advise her." She reaffirmed her decision to plead guilty (R. 159).

Babcock further testified that after taking petitioner before Judge Lederle (R. 159), he informed the judge that petitioner wished him to make a motion to change her plea from that of not guilty to guilty (R. 160).

> * * * Thereupon I recall the Court proceeded in the normal way. Now, the normal procedure is for the Court to ask the Defendant if the information given to the Court is correct, if the Defendant desires to plead guilty, and ask the Defendant if such plea of guilty is tendered by reason of any promises made to the Defendant, if such plea of guilty is made by reason of any threats made upon the Defendant, if such plea of guilty is their voluntary plea and made because the Defendant is guilty and if the Defendant de-

> sires to have counsel appointed by the Court. First of all, if the Defendant has counsel of his or her choosing, and if not, if the Defendant desires counsel appointed by the Court to advise the Defendant in connection with the matter. Upon being satisfied that the action tendered by the Defendant is free and voluntary, without promises or threats of any kind and because the Defendant is guilty, the Court will then accept the plea of guilty and proceed with further disposition of the case. (*Ibid.*)

Babcock denied that petitioner told him, when she signed the waiver, that the reason she was appearing there was because she did not want to go to trial; he testified that he observed petitioner reading the waiver and that she made no statement whatsoever to him regarding it (R. 162–163). He further testified relative to petitioner's understanding of the waiver (R. 166):

> * * * Judge Lederle was extremely careful and meticulous to make sure, as he always does, that she understood what she was doing.
>
> * * * * *
>
> He interrogated her as to whether she wished to have counsel represent her and advised her as to signing a waiver of that right. Again, Mr. Field, I hope you understand, and I wish to say again that I have no distinct recollection now—let me put

it this way: if any of our Judges have missed doing that, I would have remembered that very distinctly.

Kirby testified (R. 133) that "the Judge inquired whether or not the plea of guilty was upon the suggestion of any Government agent," and petitioner said no.

Collard testified that he was in the court room and that Judge Lederle asked petitioner a number of questions but that he could not recall them all. He said that the judge "went to considerable pains to ask her the questions that he should have to guarantee the rights that she had, and to convince himself * * *" (R. 139).

Petitioner testified that, after leaving the court room, she told agents Kirby and Dunham that she should not have pleaded guilty, that she had done the wrong thing because she was not guilty (R. 72–73). Kirby denied that she made such a statement after leaving the court room, although he testified that much later, in January 1944, she made such a statement (R. 133). Dunham was not questioned about the matter. Collard testified that petitioner made no such remark either to him or to anyone else in his presence as she left the court room and returned to jail (R. 139).

At the conclusion of the testimony, the district judge found that petitioner had failed to sustain

the allegations of the petition by a preponderance of the evidence. He said (R. 170–171, 174):

> In the petition filed in this cause the petitioner directly or by implication charges that the District Attorney having the case in charge and agents of the Federal Bureau of Investigation mislead her or made promises to her that, which at least some degree, influenced her action in pleading guilty to the charge. I am of the opinion that these charges have now been abandoned by the petitioner but for the purpose of the record I wish to state most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications. The conduct of both the officials of the District Attorney's office and the agents of the Federal Bureau of Investigation were meticulous in safeguarding the rights of the petitioner and that the record is utterly bare of any support of petitioner's contentions.
>
> The petitioner is a woman obviously of good education and above the average in intelligence. Her knowledge of English was fluent and ample. * * *
>
> * * * * *
>
> The only substantial question in this case is whether the petitioner intelligently and knowingly waived her constitutional rights. It was her obligation to sustain the allegations of her petition by a preponderance of evidence. Not only has she failed in this but I believe that the evidence

> is overwhelming against her contentions. The petitioner is an intelligent, mentally acute woman. She understood the charge and the proceedings. She freely, intelligently and knowingly waived her constitutional rights. I conclude, therefore, that there is no merit in her petition and that it shall be dismissed together with the writ.

On appeal, the judgment of the district court was affirmed (R. 181), one judge dissenting (R. 189–198).

SUMMARY OF ARGUMENT

The only issue here is credibility, whether the district judge was warranted in finding, from the evidence adduced at the habeas corpus hearing, that petitioner, who was collaterally attacking the jugment of conviction, failed to sustain her burden of proving that she did not freely, intelligently and knowingly waive her right to counsel and her right to a trial of the charge against her. The present case does not involve the legal sufficiency of her allegations or of her testimony. The question is whether the trial judge, who saw and heard the petitioner and the other witnesses, was bound to believe her inconsistent, contradicted, interested tale, which differed in numerous and significant particulars from one she had advanced when, acting through counsel some eighteen months earlier, she had moved to withdraw her plea of guilty.

I

Petitioner bore the burden of proving by a preponderance of evidence that she did not intelligently waive her right to counsel. The district judge found not only that she failed to sustain this burden but that the overwhelming weight of the evidence pointed to a knowing waiver. This finding was clearly correct.

Petitioner is an intelligent, mentally acute woman. Her background negatives a cringing attitude; and the record reflects a not inconsiderable shrewdness. She was advised by Judge Moinet of her right to counsel on the occasion of her original arraignment, and an attorney was in fact appointed to represent her at the arraignment; on his advice she stood mute. She was also told that another attorney would be appointed to represent here at subsequent proceedings. The only reason why another attorney was not appointed was that she thereafter decided she did not desire the further assistance of counsel, and she so advised the court when she changed her plea to guilty.

Prior to her change of plea, petitioner's husband made every effort to induce her to retain counsel, but she forcefully repudiated the idea. The F. B. I. agents likewise advised her to engage counsel. She admitted that the reason why she did not change her plea to guilty on Septem-

ber 28, 1943, was her husband's insistence that she consult an attorney first.

The only decision petitioner had difficulty in making was whether to plead guilty or not, and on this she wanted to make up her own mind. After attempting, unsuccessfully, to attach conditions to her proffered plea of guilty, she finally decided to plead guilty unconditionally. Before accepting her change of plea on October 7, 1943, Judge Lederle was careful to ascertain that she was fully cognizant of her right to counsel and voluntarily waived it, that she pleaded guilty because she believed herself guilty, and that such plea was not made at the suggestion of any government agent.

II

The only possible basis for a contention that petitioner may not have intelligently pleaded guilty was her testimony that an F. B. I. agent gave her erroneous advice to the effect that mere association with criminal conspirators was sufficient of itself, without criminal intent, to make a person guilty of criminal conspiracy. But the only evidence to that effect was petitioner's own statement. The agent concerned did not admit the giving of such erroneous advice, and the remainder of his testimony was inconsistent with any such admission. Furthermore, petitioner's testimony on cross-examination contradicted her own statement that she did not understand the

charge and that she was misled by the agent's advice into thinking herself guilty.

The district judge did not believe petitioner's testimony that she misunderstood or was misinformed as to the nature of the charge. He was fully justified in refusing to give her credence, in view of her self-contradictions, in view of the fact that in many respects she was specifically contradicted by other witnesses, and particularly in view of the circumstance that her story of receiving misleading advice from an F. B. I. agent first appeared in her petition for habeas corpus, filed in February 1946, and did not appear in her affidavit in support of her motion to withdraw her plea of guilty, which she had filed through an attorney eighteen months earlier.

The district judge was thus amply warranted in disbelieving petitioner's self-serving, contradictory, and in some aspects inherently incredible story; and an appellate court, which did not see and hear the witnesses, is in no position to say that he erred in rejecting a story so obviously the result of recent contrivance.

ARGUMENT

It is essential at the outset to emphasize the issue which is—and the issues which are not—before this Court.

The present case does not involve a direct attack upon a conviction by way of appeal or certiorari on the ground that, in a federal court,

petitioner was denied assistance of counsel in violation of the Sixth Amendment (*Glasser* v. *United States*, 315 U. S. 60), or was denied such assistance in a state court in violation of the Fourteenth (*Powell* v. *Alabama*, 287 U. S. 45).

Nor does the present case turn on the sufficiency of allegations in a collateral attack upon a conviction by way of habeas corpus, a question which has been frequently considered here of late years. Most of those instances, whether they involved collateral attack upon federal judgments in federal habeas corpus proceedings,[5] or upon state judgments in state habeas corpus proceedings,[6] or upon state judgments in federal habeas corpus proceedings,[7] involved only matters of pleading; there, when the allegations were found to state a cause of action, the familiar pattern has been a remand to enable the petitioner to establish the truth of his allegations.

Neither does the present case pose the question whether, upon undisputed facts, or upon facts found by the trier of facts, the petitioner is en-

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[5] *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101; *United States ex rel. McCann* v. *Adams*, 320 U. S. 220; cf. *Frame* v. *Hudspeth*, 309 U. S. 632.

[6] *Smith* v. *O'Grady*, 312 U. S. 329; *Hysler* v. *Florida*, 315 U. S. 411; *Cochran* v. *Kansas*, 316 U. S. 255; *Pyle* v. *Kansas*, 317 U. S. 213; *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *Rice* v. *Olson*, 324 U. S. 786; *Hawk* v. *Olson*, 326 U. S. 271.

[7] *House* v. *Mayo*, 324 U. S. 42; cf. *Ex parte Hawk*, 321 U. S. 114.

titled to be released from state [8] or federal [9] custody. Nor are any procedural or jurisdictional questions raised.[10]

The only issue in this case is whether the district judge was warranted in finding (R. 170, 174), from the evidence adduced at the habeas corpus hearing, that petitioner failed to sustain her burden of proving that she did not freely, intelligently, and knowingly waive her right to the assistance of counsel, of proving that she did not freely, intelligently, and knowingly plead guilty, and of proving that she was misled or influenced by federal agents in pleading guilty. Whether or not petitioner did so waive her rights, whether she was improperly influenced, were purely questions of the credibility of witnesses. Those questions the district judge resolved against petitioner. We submit that he was amply justified in so doing.

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[8] *Betts* v. *Brady*, 316 U. S. 455; *Canizio* v. *New York*, 327 U. S. 82; *De Meerleer* v. *Michigan*, 329 U. S. 663; *Gayes* v. *New York*, 332 U. S. 145.

[9] *Bowen* v. *Johnston*, 306 U. S. 19; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269.

[10] E. g., the procedural requirements under the federal habeas corpus statute (*Holiday* v. *Johnston*, 313 U. S. 342), or the jurisdiction of this Court in habeas corpus proceedings, whether original (*Ex parte Hawk*, 321 U. S. 114) or appellate (*White* v. *Ragen*, 324 U. S. 760; *Woods* v. *Nierstheimer*, 328 U. S. 211), or the scope of review where jurisdiction to review exists (*Carter* v. *Illinois*, 329 U. S. 173; *Foster* v. *Illinois*, 332 U. S. 134).

As this Court said in *Hawk* v. *Olson*, 326 U. S. 271, 279, the right to a hearing, "of course, does not mean that uncontradicted evidence of a witness must be accepted as true on the hearing. Credibility is for the trier of facts. The evidence may show that * * * petitioner * * * had ample opportunity to consult with counsel * * *. He may have intelligently waived his constitutional rights. * * * Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity."

Here petitioner had full opportunity to prove her allegations. But she failed to do so. She was disbelieved; properly so, as we shall show. And, once more, we emphasize the sole issue here: credibility. Petitioner's brief follows the error of the dissenting judge below (R. 196, 197) in assuming, in the vital instances, the truth of her own rejected testimony (Br. 12, 36, 48–49).

I

THE DISTRICT JUDGE WAS WARRANTED IN FINDING THAT PETITIONER INTELLIGENTLY WAIVED HER RIGHT TO COUNSEL

The record of the convicting court shows that petitioner was advised by the court of her right to counsel, that she was asked by the court whether she desired that counsel be assigned her, and that she thereupon, in open court, voluntarily waived her right to counsel (R. 35–36). In her

petition for a writ of habeas corpus, petitioner attacked this record of the convicting court by alleging that she "was neither aware nor properly advised of her right to have the assistance of counsel for her defense and did not understandingly waive the same" (R. 2). The burden of proving this allegation by a preponderance of evidence, of course, rested upon petitioner. *Johnson* v. *Zerbst,* 304 U. S. 458, 468–469; *Hawk* v. *Olson,* 326 U. S. 271, 279. The district judge found not only that petitioner failed to sustain this burden, but that the overwhelming weight of the evidence was against her allegations (R. 170, 174). We submit that this finding is clearly correct, and that petitioner's testimony at the hearing below that she was unaware of her right to counsel was, from the evidence as a whole, including her own admissions, utterly incredible. Nothing in the dissenting opinion below, moreover, suggests that petitioner may have been unaware of her right to counsel. The dissenting judge based his dissent on an entirely different ground, hereafter to be discussed under Point II.

The record establishes that petitioner is an intelligent, mentally acute woman of good education, and that despite the fact that she was living, prior to her arrest, with two of her children, one of whom was a diabetic requiring a good deal of attention (R. 48), she led a fairly active social life. The record moreover establishes that she was a

purposeful and strong-willed individual who made up her own mind and was insistent upon doing so.

Her intelligence impressed the trial judge at the very outset of the hearing (R. 49), and it is manifest from the record that, throughout her testimony, she exhibited qualities of considerable shrewdness. Even the cold record shows that this woman was no terrified ignoramus, and while on occasion she lapsed into unidiomatic English, the quality of her diction in other parts of her testimony was unexceptionable. The trial judge, who observed her demeanor and so had opportunity to judge the genuineness of the lapses, considered her English to be fluent. And it is significant that, at the time of her plea in 1943, she had lived in the United States some sixteen or seventeen years (R. 70), her husband was an instructor at the University, and she had a German title of nobility. This petitioner, clearly, was no cringing illiterate suddenly transported to a foreign land.

By petitioner's own admission, she was advised of her right to be represented by counsel, notwithstanding her inability to pay for legal assistance, on the occasion of her original arraignment on September 21, 1943, at which time an attorney was in fact appointed to represent her and did represent her, though for purposes of the arraignment only. It cannot be disputed that this lawyer's services were entirely adequate for that purpose. Also by her own admission, she

was told by the court that another lawyer would be appointed to represent her in subsequent proceedings. While no other attorney ever did represent her, this was solely because she thereafter decided she did not desire counsel, despite repeated advice from numerous sources that she should get counsel; and she advised the court that she did not desire counsel when, two weeks after her original arraignment and entry of a plea of not guilty, she formally waived her right to counsel and changed her plea to guilty.

The record establishes that between the time of her original arraignment and her change of plea her husband, who, incidentally, had some training in German law (R. 97), made every effort to induce her to retain counsel (R. 60, 103, 131–132, 147–148). He sent two attorneys to visit her and talk to her about the case (R. 91–92, 114). While they told her that they were there as friends of her husband and not as attorneys (R. 116), she herself admitted that they asked her whether she planned to retain counsel and that she explained to them that counsel was to be appointed for her (R. 93). The F. B. I. agents on numerous occasions likewise advised her to engage counsel (R. 129, 147, 153). Notwithstanding her testimony that she "was wondering about the lawyer who never came" (R. 103), i. e., the lawyer the court promised to appoint for her, her statements and conduct clearly indicated that

she not only was not anxious for the promised attorney to come, but that she forcefully repudiated the idea of counsel both to her husband and to the F. B. I. agents (R. 131–132, 137, 147–148). She became annoyed at her husband's insistent attitude on the matter and told one agent that her visits with her husband were "unpleasant" because "he wanted her to have advice before she did anything" (R. 148). By her own admission, the reason why she did not plead guilty on September 28, 1943, when she had her first interview with Babcock, was because her husband pleaded with her not to take such action before consulting an attorney (R. 60, 103–104). She also admitted that when she announced to Collard and Hanaway on October 7, 1943, that she had finally decided to plead guilty, they asked her whether she had consulted with her lawyer about such a course of action (R. 63). In view of these admissions, we submit that her negative answer to the question, "Then you knew at that time that you were entitled to a lawyer before you pled guilty, if you wanted one?" (R. 103), is manifestly unworthy of credence.

The evidence showed that the only decision she was having difficulty in making was whether to plead guilty or not, and on this she wanted to make up her own mind (R. 60, 131–132, 135, 137, 148, 158). The only considerations which she deemed important in making this decision

were her chances, if she pleaded guilty, of never being deported, of being incarcerated in an institution close to her home in the event she was sentenced to imprisonment, and of securing an end to the unfavorable publicity which had attached to the case and which was adversely affecting her husband's employment and standing in the community (*supra*, pp. 18–20). She sought to secure some sort of guarantee from the prosecuting attorney that these three "conditions" would be fulfilled if she pleaded guilty, but he, of course, could not and did not make any such guarantee (*supra*, pp. 19–20). Nevertheless, she decided after further deliberation to plead guilty anyway, and to take her chances on the realization of her desires in the matter. She then announced her decision to the prosecuting attorney, who satisfied himself that she wished to plead guilty because she felt that she was guilty (R. 159). The prosecuting attorney then brought her before Judge Lederle to effect the change of plea. The judge accepted her plea of guilty only after satisfying himself by careful questioning that the plea was not the result of threats or promises but of a sense of guilt, and that, with knowledge of her right to counsel, petitioner voluntarily waived that right (*supra*, pp. 26–29).

That Judge Lederle was careful to ascertain, before accepting petitioner's plea of guilty, that she was fully cognizant of her right to counsel and voluntarily waived it, was not only definitely

established by the testimony of Babcock and the agents who were present (*supra*, pp. 26–29), but corroboration is to be found in petitioner's own admission that the judge was at first unwilling to accept her change of plea because of "something about an attorney," though she later expressed uncertainty as to just what "about an attorney" disturbed him (R. 66, 107).

As the court below pointed out (R. 186), this case is entirely unlike *De Meerleer* v. *Michigan*, 329 U. S. 663. There, "At no time was assistance of counsel offered or mentioned" to the 17-year-old defendant (329 U. S. at 665). Here, by petitioner's own admission, when she appeared before Judge Lederle to change her plea to guilty, he at first said that he could not accept the change of plea because an attorney should be present. It was only after he satisfied himself, by carefully interrogating her, that petitioner desired to plead guilty without counsel that he accepted her plea. Thus, as the court below further observed (R. 186), petitioner "had already been informed by one judge that she was entitled to an attorney appointed by the court, and now a second judge put the specific question to her, whether she was represented by counsel, whether she wished counsel assigned by the court, and she said no."

Petitioner's testimony (R. 73) that she was not aware when she pleaded guilty of the presumption of innocence enjoyed by defendants in American courts and did not learn of it until

two or three months thereafter is, we submit, without special significance in this case. Advice regarding this presumption is but one of the many kinds of advice a lawyer may be expected to give his client, and the evidence overwhelmingly established that petitioner freely and intelligently waived her right to counsel. The right of the Government and the courts to rely on a free and intelligent waiver of the right to counsel would obviously be illusory if every defendant who made such a waiver and was thereafter convicted, whether on a plea of guilty or otherwise, could then revoke his waiver and secure a new trial on the ground that he would have adopted different tactics if he had known something that an attorney might have told him.

What was said in *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 276–277, covers this case exactly:

> It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by

trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended: It is true, of course, that guilt under § 215 of the Criminal Code, which makes it a crime to use the mails to defraud, depends upon answers to questions of law raised by application of the statute to particular facts. It is equally true that prosecutions under other provisions of the Criminal Code may raise even more difficult and complex questions of law. But such questions are no less absent when a man pleads guilty than when he resists an accusation of crime. And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice. The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused in-

competent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

II

THE DISTRICT JUDGE WAS WARRANTED IN FINDING THAT PETITIONER INTELLIGENTLY PLEADED GUILTY

The dissenting judge below did not question that petitioner, with knowledge of her right to counsel, freely waived the right. Rather, the sole basis of his dissent was his belief that the record established that an agent of the F. B. I., in all honesty, but erroneously, advised petitioner that she was guilty of conspiracy if she merely conferred with people who later turned out to be criminals, that in reliance on the truth of this advice petitioner felt her case was hopeless, and that, believing that the retention of counsel would be superfluous under the circumstances, she decided to plead guilty without the advice of counsel (see R. 197). It was only because the dissenting

judge believed the record established the giving of this misleading advice that he felt petitioner "did not competently and intelligently waive her right to counsel" and did not intelligently plead guilty (*ibid.*).

The only evidence in the record, however, that an F. B. I. agent gave petitioner this erroneous advice is her own statement to that effect, which the district judge certainly was not required to, and obviously did not, believe (R. 170, 174). Petitioner gained her erroneous impression of what was required to make one a conspirator, she testified, from the agent's explanation of the indictment by the use of a hypothetical illustration involving "rum runners," in which an innocent person who associated with criminal conspirators became himself a criminal conspirator (R. 55). Collard, the agent involved, did not, however, admit that he ever misinformed petitioner. In fact, he testified that he had no recollection of ever having used an illustration of conspiracy involving "rum runners" (R. 142), much less that he ever attempted to explain a conspiracy by any illustration in which one of the "conspirators" lacked the essential requirement of criminal intent. He admitted the possibility that he might have used an illustration involving "rum runners" (R. 143), but he certainly did not admit, as the dissenting judge seems to have assumed (see R. 194), that he might have given any such illus-

tration in the manner attributed to him by petitioner—that is, in such a way as to indicate guilt of conspiracy by one innocent of all criminal intent. He testified that he attempted, at petitioner's behest, to explain to her the meaning of conspiracy to the best of his ability (R. 142). He further restated his belief, expressed earlier in an affidavit opposing petitioner's motion to withdraw her plea of guilty, that petitioner's plea was her free and voluntary act made after due consideration "with a full and complete understanding of the charge made against her in the indictment in the instant case" (R. 146). Such a statement would have been entirely inconsistent with any admission on his part that he gave petitioner misleading information. It strains credulity, moreover, to believe that an F. B. I. agent, a qualified attorney who had practiced law (R. 140) could himself believe, and honestly advise another, that a person could be guilty of a criminal conspiracy which was punishable by death (see 50 U. S. C. 32, 34) without any criminal intent or even knowledge of the existence of the conspiracy. It is even more incredible that he should have stated, as petitioner testified he stated (R. 76, 77), that the indictment which charged so serious a crime did not "mean much of anything," that "those charges don't mean a thing."

Furthermore, as the majority opinion below points out (R. 184), petitioner's own testimony

on cross-examination contradicted her statement that she did not understand the charge. She testified that after having read the indictment she felt innocent—"definitely so"—of the charges contained in it. The cross-examiner then observed that she must have known what the charges were. Confronted with this logical conclusion, she lamely explained, "Oh, no, and so far I might explain that to you, I knew * * * not what the charges were, but I knew as I said before that I saw I was accused of something of which I was not guilty. That was how I understood that." (R. 90–91.) A little later on, petitioner was asked whether she still felt innocent of the charges after talking to Collard and hearing his explanation of the indictment. She stated that she did still feel innocent. (R. 91.) Obviously, this answer was utterly inconsistent with her contention that she was misled by Collard into believing that innocent association with criminal conspirators sufficed to make her guilty. It will be recalled, too, that the attorney who represented petitioner at her original arraignment, and certainly a disinterested witness, as the court below noted (R. 183), testified without contradiction that petitioner indicated to him that she understood what "this was all about" (R. 111, 113).

Petitioner admittedly read the entire indictment (R. 90), and there was evidence that she

had marked the paragraphs concerning her (R. 140, 142). She admitted reading five overt acts (R. 91), the precise number out of forty-seven alleged (R. 25–34) which concerned her. It is difficult to believe that a "mentally acute" woman, "obviously of good education and above the average in intelligence," and having a "fluent and ample" command of English (R. 171, 174; see also R. 183), could read the overt acts without observing, and perceiving some significance in, the qualifying words, repeated in each like a refrain—"in pursuance of said conspiracy and to effect the object and purpose thereof." The nature of the conspiracy thus referred to was set forth in detail in the first part of the indictment, which, of course, also mentioned petitioner by name (R. 20–25). It would take very little knowledge of English, indeed, to read and understand, at least generally, the nature of the charge and its gravity.

It should be noted that petitioner testified that the agent gave her the "rum runners" illustration after she pointed out to him that she had not committed a particular overt act alleged in the indictment to have been performed by her (*supra*, p. 15). It seems reasonable to believe that the agent merely illustrated the well-established rule of law that a member of a conspiracy is liable for overt acts performed by others. *Pinkerton* v. *United States*, 328 U. S. 640, 646–647. As to his statement that he could not remember and that it was possible

that petitioner asked him "whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal" (R. 144), it should be recalled that the overt acts mentioning petitioner related to acts of meeting. And it certainly would be neither misleading nor improper to state that an act of conferring could be an overt act in furtherance of a conspiracy.

It is significant, moreover, that in her affidavit in support of her motion of August 7, 1944, for leave to withdraw her plea of guilty (R. 38–45), at a time when she was represented by counsel—by Okrent (R. 37), who had originally conferred with her at her husband's request—petitioner said not a word about Collard's use of any "rum runner" illustration to explain conspiracy, nor did she otherwise charge or suggest that Collard told her that a person innocent of all criminal intent would be guilty of conspiracy merely by virtue of having associated with conspirators. Surely, it seems to us, if Collard did so misadvise her, and if she pleaded guilty in reliance on such misadvice, she would have thought it of sufficient importance to include in this affidavit, which outlined at great length all the reasons why her plea of guilty was ill-considered.

Indeed, this circumstance—the undisputed and unexplained fact that the "rum runner" story nowhere appears in her August 1944 affidavit in sup-

port of her motion to withdraw her plea of guilty, and first emerges eighteen months later in her petition for habeas corpus—is almost conclusive proof, in and of itself, of the falsity of her tale about Collard's advice.

The district judge, who heard and observed the witnesses, obviously did not believe that Collard had misinformed petitioner, or even that petitioner was uninformed. He found that she "understood the charge and the proceedings" (R. 174), and further found that her allegations concerning the F. B. I. agents were false. He said (R. 170):

> In the petition filed in this cause the petitioner directly or by implication charges that the District Attorney having the case in charge and agents of the Federal Bureau of Investigation mislead her or made promises to her that, which at least some degree, influenced her action in pleading guilty to the charge. I am of the opinion that these charges have now been abandoned by the petitioner but for the purpose of the record I wish to state most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications. The conduct of both the officials of the District Attorney's office and the agents of the Federal Bureau of Investigation were meticulous in safeguarding the rights of the petitioner and that the record is utterly bare of any support of petitioner's contentions.

And, we submit, he was amply warranted in refusing to believe petitioner's testimony that she was misled by the agent. As we have indicated in the Statement, petitioner's testimony at the hearing was replete with self-serving statements which, in numerous particulars, were contradicted by her own witness Berger, as well as Babcock and the F. B. I. agents.

Moreover, as to one incident concerning Collard which was mentioned in her August 1944 affidavit, her version at the hearing was materially different (cf. note 3, *supra*, p. 21). This incident concerned Collard's reply to a certain question put to him by petitioner. Whereas Collard's reply was admittedly, according to the earlier version, "a perfectly proper and normal answer," the later version of the same incident seems deliberately to have been colored so as to put the good faith of Collard's answer in serious doubt.

In addition, several of petitioner's self-serving statements were, we submit, inherently incredible. See, particularly, her testimony on cross-examination that she did not know, after her husband urged her not to plead guilty without consulting a lawyer, that she was entitled to a lawyer if she wished one, and that she did not know she did not have to plead guilty if she did not want to (R. 103). See also her testimony that the reason why she kept asking the F. B. I. agents for advice as to how to plead was because "There was nobody else I could ask" (R. 96). Not only did

she have ample opportunity to ask such advice from her husband, but she admittedly was emphatically advised by him, as we have seen, not to plead guilty without advice of counsel. Likewise, she had the opportunity to ask attorneys Okrent and Berger, whom her husband sent to her, and, in fact, according to Berger, the "question of pleading guilty came up" in their conference with her (R. 120). Finally, and most important, she could, if she chose, have asked the advice of any attorney of her own choosing, or of a court-appointed attorney if she lacked the means of retaining counsel of her own choice. For, as we have urged before, petitioner certainly was aware of her right to counsel.

And, as we have already pointed out, there are vast discrepancies—and a time interval of eighteen months—between petitioner's sworn statements in support of her motion for leave to withdraw her plea of guilty and her sworn statements in her petition for a writ of habeas corpus. The grounds of the former were, in substance, merely that her plea of guilty was made under circumstances of extreme emotional stress, without knowledge of her legal rights and a thorough understanding of the nature of the offense charged, and without the assistance of counsel (R. 37, 38–45). The petition for habeas corpus, on the other hand, made the sweeping and serious charge that she was "coerced, intimidated and deceived" into pleading guilty, notwithstanding

her belief in her innocence (see R. 2). This substantial change in position during an interval fraught with significant consequences for petitioner,[11] is, we submit, strong and convincing evidence against her general credibility.

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[11] After the filing, in this Court, of petitioner's motion for enlargement on recognizance, the Acting Solicitor General, on June 10 last, advised the Court of the pendency of deportation proceedings against petitioner.

The Department of Justice files indicate the occurrence of the following facts in the interval between petitioner's judgment of conviction on November 15, 1944 (R. 8) and her petition for habeas corpus, filed February 7, 1946 (R. 1):

On July 16, 1945, petitioner was ordered "interned" by the Attorney General as an alien enemy "potentially dangerous to the public peace and safety of the United States." On November 1, 1945, petitioner was advised that, by order of the Attorney General, issued pursuant to a Presidential proclamation of July 14, 1945, it had been determined she should be "removed and repatriated to the country of your nationality as soon as arrangements for your transportation can be made," subject to the privilege of a hearing before a hearing board appointed by the Attorney General prior to the issuance of a final order for her removal and repatriation. On November 14, 1945, petitioner requested a hearing on the question of whether she should be repatriated. Because of the fact that petitioner was serving a federal prison sentence, however, the requested hearing was not held, and the repatriation proceedings have been held in abeyance pending petitioner's release from imprisonment.

The institution of repatriation proceedings between petitioner's conviction and her filing of the petition for habeas corpus is, we think, significant in the light of the evidence that petitioner sought, unsuccessfully, to procure a "guarantee" that she would never be deported as a condition of her plea of guilty (*supra*, pp. 18–20), and of her testimony (R. 101) that it was "as to the deportation, about which I was worried most."

The record of the convicting court shows that petitioner, having been advised of her right to counsel, voluntarily and intelligently waived her right and pleaded guilty. The presumption of regularity which attaches to a judicial judgment is not lightly to be rebutted on collateral attack. *Johnson* v. *Zerbst,* 304 U. S. 458, 468–469; *Hawk* v. *Olson,* 326 U. S. 271, 279. Petitioner had a full and fair hearing of her contention that she did not knowingly and intelligently waive counsel and plead guilty. The issue presented to the district judge was fundamentally one of accepting or rejecting petitioner's testimony in respect of whether she knew of her right to counsel when she waived it and of the nature of the charge to which she pleaded guilty. The district judge, who observed petitioner's demeanor, rejected her testimony in those respects. The record establishes, if the government witnesses were entitled to any credence at all, that petitioner was not above misrepresenting the facts whenever it seemed to her advantage to do so. And the record, as a whole, strongly suggests recent contrivance.

We submit, therefore, that the district judge was amply justified in rejecting petitioner's testimony.

It is of course a commonplace among those familiar with trials that no printed record, however faithfully it may reproduce the language of

the witnesses, will ever convey to a reader the demeanor, or the nuances of expression, or the intonations of those whose words are set down in black and white. Yet it is precisely on just those particulars that the trier of facts must in large measure rely in weighing and assaying conflicting accounts of the same transaction.

It may appear, at a first reading, that a circumstantially detailed account of a particular conversation is intrinsically more reliable than the opposing witness's "I don't remember." But "I don't remember" may run the gamut from downright perjury to a thoroughly honest and complete evaporation of recollection, from the "*Non mi recordo*" of the notorious Majocchi (*Queen Caroline's Trial;* see 3 Wigmore, *Evidence* (3d ed. 1940) § 995) to the genuine lack of memory on the part of a witness, who in the interval between the conversation in question and his testimony concerning it has participated in hundreds of other conversations in more or less similar circumstances.

Here the strongest point that petitioner could marshal in her favor was her story—which had not appeared in her August 1944 affidavit—of Collard's alleged account of the "rum runner" incident. Collard, testifying almost two and a half years after the alleged conversation, said he did not recall making any such statement. The dissenting judge below correctly characterized this as "the crucial and

decisive feature of the case" (R. 192), but fell into grave error (R. 196, 197) in calling the matter undisputed, and in undertaking to believe petitioner (R. 194) simply because Collard did not specifically deny the incident. For neither the circuit court of appeals nor this Court is in a position to reproduce the demeanor of petitioner when she told about the incident or that of Collard when he denied remembering it. The trial judge heard and saw both witnesses, and, thereafter, found that petitioner had not been misinformed as she alleged. That opportunity, we submit, renders it impossible for any appellate court to hold him wrong, even in the absence of specific contradiction of petitioner's story in this respect, particularly in view of the circumstances that petitioner was specifically contradicted in numerous other respects, that petitioner contradicted herself in many particulars, that she told an inherently improbable story, and—most significant—that her account of Collard's alleged advice nowhere appears in her August 1944 motion and first turns up in her habeas corpus petition of February 1946. All of these vital circumstances were overlooked by the dissenting judge below.

We are not suggesting here the application of any rigidly mechanical rule as to the inviolability of concurrent findings by two courts. We assume *arguendo* that this may be the kind of case where the normal standard of appellate review yields to a careful scrutiny *de novo* here (cf. *Knauer* v.

United States, 328 U. S. 654, 657). But we submit that, in a case such as this one, review *de novo* by two appellate courts still does not alter the inescapable and primary circumstance that the viewing and reviewing of a record in black and white cannot overcome the superior opportunities available to the trier of facts who saw and heard the witnesses.

We have here the case of an intelligent, purposeful, strong-minded woman who deliberately and consciously disregarded the advice, repeatedly pressed upon her from several quarters, to consult a lawyer. She insisted on proceeding without one, and pleaded guilty. Nearly two and a half years later, after the consequences of her act disappointed her expectations—i. e., after she was about to be deported—she alleged for the first time that she was tricked into pleading guilty by erroneous advice given her by a government agent. In the interim, although she had made a previous attempt, through counsel, to withdraw her plea of guilty, she had never stated that any such advice had been given her. After a full hearing on the allegations of her petition for habeas corpus, a district judge who saw and heard petitioner, the agent, and numerous other witnesses, disbelieved petitioner and made findings to that effect. These findings were concurred in by the majority of the court below.

To reverse those two courts now, simply because petitioner's story, in black and white and apart from the circumstance that it was never put forward earlier though opportunity to do so was presented, seems appealing, cannot, we strongly submit, be justified under any proper or accepted standards of appellate review or judicial administration. Moreover, to reverse those two courts now "would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land" (*Foster* v. *Illinois*, 332 U. S. 134, 139); would place a valuable premium on recent contrivance, now and in the future; and would do a lasting disservice to the administration of justice.

CONCLUSION

The judgment below was correct and should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1947.

Marianna von Moltke, Petitioner, v. A. Blake Gillies, Superintendent of the Detroit House of Correction.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 19, 1948.]

Mr. Justice Black announced the judgment of the Court and an opinion in which Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge concur.

The petitioner was indicted for conspiracy to violate the Espionage Act of 1917.[1] The specific charge was that, in order to injure the United States and to aid the German Reich, she and twenty-three others had conspired during the second World War to collect and deliver vital military information to German agents.

With no money to hire a lawyer and without the benefit of counsel the petitioner appeared before a federal district judge, told him that the indictment had been explained to her, signed a paper stating that she waived the "right to be represented by counsel at the trial of this cause," and then pleaded guilty. Under her plea she could have been sentenced to death or to imprisonment for not more than thirty years. After thirteen months in jail following her plea, the court sentenced her to four years in prison.

In this habeas corpus proceeding she charged that the sentence, resting as it did solely on her plea of guilty,

[1] Section 32 defines the substantive crime of espionage. Section 34 declares conspiracies to violate § 32 to be unlawful. 40 Stat. 217, 50 U. S. C. §§ 32, 34.

was invalid for two reasons: First, she alleged that the plea was entered by reason of the coercion, intimidation, and deception of federal officers in violation of the due process clause of the Fifth Amendment. Second, she alleged that she neither understandingly waived the benefit of the advice of counsel nor was provided with the assistance of counsel as required by the Sixth Amendment. As the Government concedes, these charges entitle the petitioner to have the issues heard and determined in a habeas corpus proceeding, and, if true, invalidate the plea and sentence.[2] The District Court heard evidence offered by both the petitioner and the Government, and then found that she had failed to prove either contention. The Sixth Circuit Court of Appeals affirmed, with one judge dissenting. 161 F. 2d 113.

On the basis of what he designated as "the undisputed evidence," the dissenting judge concluded that petitioner had pleaded guilty because of her reliance upon the legal advice of a Federal Bureau of Investigation (FBI) lawyer-agent, which advice "was though honestly given, false." Neither the District Court nor the majority of the Circuit Court of Appeals controverted this conclusion of the dissenting judge. A challenge to a plea of guilty made by an indigent defendant, for whom no lawyer has been provided, on the ground that the plea was entered in reliance upon advice given by a government lawyer-agent, raises serious constitutional questions. Under these circumstances we granted certiorari in this case. 331 U. S. 800.

It thus becomes apparent that determination of the questions presented depends upon what the evidence showed. There was conflicting testimony on many points in this case. We do not attempt to resolve these con-

[2] *Waley* v. *Johnston*, 316 U. S. 101; *Walker* v. *Johnson*, 312 U. S. 275, 286; *Johnson* v. *Zerbst*, 304 U. S. 458, 467; cf. *Sunal* v. *Large*, 332 U. S. 174, 177.

flicts. Our conclusion is reached from the following facts shown by the testimony of government agents or by undisputed evidence offered by petitioner.

The petitioner was born in Germany. In that country she bore the title of countess. She and her husband came to the United States in December, 1926. Since 1930 they have lived in Detroit where the petitioner has been a housewife and her husband an instructor in German at Wayne University. Her husband is a naturalized citizen of the United States; her own naturalization papers have been pending for some time. They have four children, three of whom were born in this country as American citizens.

August 24, 1943, between 6 and 7 a. m. six FBI agents came to their home. The petitioner was in bed. She was informed that she must get up and go with them. The home was searched with her husband's permission. She was taken to the local office of the FBI, fingerprinted, photographed, and examined by a physician. From there she was taken to the Immigration Detention Home, placed in solitary confinement, and, with one exception noted below, not permitted to see or communicate with anyone outside for the next four days. Two FBI agents persistently but courteously examined her every day from about 10 a. m. until about 9 p. m. She knew nothing about her arrest and detention except that she was being held indefinitely on a presidential warrant "as a dangerous enemy alien." She was informed "that the FBI is an investigating agency, and not a prosecuting, and as an enemy alien I [she] was not allowed to see an attorney." During this first period of questioning, the only relaxation of petitioner's incommunicado status was a single permission to relay instructions through an FBI agent to her husband who was told how to look after their nine-year-old diabetic child. This child, for whom the mother had specially cared since his infancy, required a strict diet and injections twice daily.

September 1, eight days after her early morning arrest, petitioner was taken before an Enemy Alien Hearing Board. She was not then informed of any specific charges against her, but she was told that she could not be "represented by a legal attorney" at the hearing. The results of this hearing were not made known to her. At its conclusion she was returned to the detention home.

September 18 the petitioner was handed the indictment against her. In our printed record this document covers a little more than fourteen pages. It charges generally, in the language of the statute, that the twenty-four defendants conspired to violate the statute. It also enumerates 47 overt acts alleged to have been performed in pursuance of the objects of the conspiracy, five of which acts specifically refer to the petitioner. Four out of the five merely allege that the petitioner "met and conferred with" one or more of the other defendants; the fifth alleges that she "introduced" someone to one of the defendants.

September 21, almost a month after her arrest, the petitioner and a co-defendant, Mrs. Leonhardt, were taken to the courthouse for arraignment. Upon being told that the two defendants had no attorney and no means to obtain one, the judge said he would appoint counsel right away and would not arraign them until they had seen an attorney. They were then led "to the bull pen to wait for the attorney." Before any attorney arrived they were taken back into the courtroom. Court was in session. As explained by petitioner and corroborated by others, "Judge Moinet was on the bench, and there seemed to be a trial going on because Judge Moinet appointed a lawyer in the courtroom. He said 'Come here, 'so and so,' and help these two women out,' and the young lawyer objected to that; he said he didn't want to have anything to do with that. But then he consented just for the arraignment, to help out, and he came over to us—we were sitting on the

side bench, and he asked me, 'How do you want to plead?' I said, 'Not guilty.' And he asked Mrs. Leonhardt and she said the same thing. So he told us that, he whispered to us in fact, he went over it, whispered that it would not be advisable, but I do not know even now why, but he suggested it would be proper to stand mute." In this two to five minute whispered conversation (the lawyer said "a couple of minutes") the lawyer asked both defendants if they "understood what this was all about." They indicated that they did. He did not even see the indictment, did not inform the petitioner as to the nature of the charge against her or as to her possible defenses, and did not inquire if she knew the punishment that could be imposed for her alleged offense. The case on trial was then interrupted, the charge was made against the defendants, who stood mute, and a plea of not guilty was entered. With reference to their future representation by an attorney, the petitioner's uncontradicted testimony was that the judge "said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away."

The two women, unable to get out on bond, were then immediately taken from the courthouse to the Wayne County jail. The matron there informed the petitioner that she had strict orders to hold the petitioner and Mrs. Leonhardt "incommunicado." Notwithstanding this order, however, the FBI agents continued to visit and talk with both of them and a third defendant, Mrs. Behrens, every day except Sunday. During this period all three of them were allowed to read and discuss among themselves the unfavorable newspaper reports which their arrest and indictment had occasioned. They talked also with the FBI agents about this adverse publicity and about how they should plead to the charges.

September 25, one month and one day after Mrs. von Moltke's arrest, two lawyers came to the jail to see her.

They had been sent by her husband. One of them appears to have taken the husband's language course at Wayne University. These lawyers' message was the first communication she had been permitted to receive from her husband since her removal to the county jail. She had been so well shut off from the outside world that she thought he did not even know where she was then confined. These lawyers informed her that, although they had come at her husband's request, they would not represent her as counsel. Furthermore, they warned her that they would not even hold what she said in confidence, and that they would feel free to disclose anything she told them to the Government. Only one of the lawyers appeared at the trial. He testified that the petitioner was concerned during their visit for her children and her husband, whom the university had removed from his $4,000 position the day after her arrest. She particularly inquired whether it would help her husband to get his university position back if she pleaded guilty, but received no counsel on the subject one way or another. In fact, the lawyers emphasized a number of times that they could not and would not advise her what she should do. Although they gave her a form of cross-examination regarding the charges against her in the indictment, they did not attempt to explain to her the implications of these charges, or to advise her as to any possible defenses to them, or to inform her of the permissible punishments under the indictment.

September 28, three days after the lawyers' visit, the petitioner and Mrs. Leonhardt were taken by FBI agents to the marshal's office where they talked with the assistant district attorney about what plea they should enter. Mrs. Leonhardt announced there that she would plead guilty, which plea she later entered, but the petitioner first asked for the opportunity of discussing the matter with

her husband. He came to the marshal's office, was allowed to talk with his wife in the "bull pen," and advised her not to do anything before she saw a lawyer. She then declined to plead guilty and was taken back to jail.

October 7, nine days later, she did plead guilty without having talked to any lawyer in the meantime except the FBI agent-attorneys, although she had seen her husband several more times. A few days before the 7th, Mrs. Behrens had entered a plea of guilty, and rumors reached the petitioner that other defendants named in the indictment would also plead guilty. During the interval between the 28th of September and petitioner's plea of guilty on the 7th of October, the FBI men had talked to her daily. She had particularly asked them whether under United States law she would have the right to a trial if all her co-defendants pleaded guilty. The agent's reply, as he remembered it, was "that the question of trial would be up to the United States attorney's office." She also repeatedly plied the agents with questions as to what plea she should enter in order to reduce as much as possible the injurious publicity of the affair, and what would be the least harmful course to make it possible for her husband to recover his old position. She was also vitally interested in whether she would be deported, and whether, if she did plead guilty, her sentence could be served close to her family. All of these subjects the agents talked over with her in their daily conversations and one of them offered to, and did, discuss them with the assistant district attorney on her behalf. Following this discussion, the agent brought back word to the petitioner that the assistant district attorney could not control deportation, publicity, or the place of her imprisonment, but that if she pleaded guilty he would write a letter to the controlling authorities and recommend that she be imprisoned close to her family.

About this time one of the lawyer-agents of the FBI discussed the petitioner's legal problems with her at great length. According to his testimony he did his best to explain the implications of the indictment. She told this agent-attorney about a statement she had heard while in jail that unless she pleaded guilty her husband would be involved, and she asked the agent if this were true. He replied that he could not answer this question. She also asked one of the lawyer-agents whether mere association with people guilty of a crime—such association as that with which she was charged in the five overt acts—was sufficient in itself to bring about her conviction under the indictment. This agent, according to the petitioner, then explained the indictment to her by the use of a "Rum Runners" plot as an example. She testified that he said: "That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy . . . ." The FBI agent did not deny that he had given her the rum runner illustration. In fact, the agent said that it was quite possible that the conversation had occurred.[3]

During the ten days prior to her plea of guilty, petitioner had many conversations with FBI agents about how she should plead to the indictment. In resolving her doubts she had no legal counsel upon whom to rely

[3] "Q. And did you during that discussion use a [*sic*] illustration about a rum runner?

"A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

"Q. I see.

"A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration."

except the government lawyer-agents, since neither she nor her husband could afford a lawyer, and the counsel promised by Judge Moinet never appeared. Her chief concern in trying to decide whether to plead guilty was not the indictment, or possible imprisonment; as was testified by government agents, "She was concerned about her husband and his job," and "she was hoping to do whatever would be best for her husband and her child." That her troubled state of mind was recognized by the prosecuting attorney is shown by these leading questions he asked her on cross-examination:

"Q. Now, isn't it true that up until the time you plead [*sic*] guilty you repeatedly asked the agents for advice as to whether you should plead guilty or not? Isn't that true?

"A. There was nobody else I could ask.

"Q. Well, just say yes or no.

"A. Yes."

October 7, having reached a temporary decision, she went with two of the agents to the assistant district attorney and told him that she wanted to plead guilty. Since Judge Moinet was not available, she was taken before another judge who was unfamiliar with the case. At first he would not accept the plea of guilty because she then had no lawyer, and the record before him indicated that she had previously pleaded not guilty under the advice of counsel. But in response to the judge's questions, she said that she understood the indictment and was voluntarily entering a plea of guilty. The judge then permitted petitioner to sign a written waiver of counsel. The whole matter appears to have been disposed of by routine questioning within five minutes during an interlude in another trial. If any explanation of the implications of the indictment or of the consequences of her plea was then mentioned by the judge, or by anyone in his presence, the record does not show it. Nor is there

anything to indicate she was informed that a sentence of death could be imposed under the charges. The judge appears not to have asked petitioner whether she was able to hire a lawyer, why she did not want one, or who had given her advice in connection with her plea. Apparently he was not informed that the petitioner's only legal counsel had come from FBI agents.

Petitioner continued thereafter to worry about whether she had acted wisely in changing her plea to guilty. On learning in January, 1944, from an FBI agent that she could request permission to withdraw the plea, she sent messages to the district attorney, seeking such permission. Some months later Judge Moinet appointed counsel solely for the purpose of filing a motion for leave to withdraw her plea. Counsel did file such a motion, but its dismissal as tardy [4] was required by the Criminal Ap-

[4] Rule II (4) of the Criminal Appeals Rules, effective September 1, 1934, then required such motions to be filed within ten days after entry of the plea and before imposition of sentence. *Swift* v. *United States*, 148 F. 2d 361; see *Hood* v. *United States*, 152 F. 2d 431, 435; *United States* v. *Achtner*, 144 F. 2d 49, 52. It has since been liberalized by Rule 32 (d) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

Petitioner's brief states that the court denied her motion to withdraw the plea of guilty "without taking any testimony or permitting petitioner to take the stand . . . ." The Government has not challenged that statement. There is nothing in the record which indicates that the judge allowed any witnesses to testify on the motion. Nevertheless the judge, "after consideration of said motion and of the arguments presented," made purported findings of fact to the effect that she had pleaded guilty "after due and careful deliberation" and that at the time she entered the plea she "thoroughly understood the nature of the charge contained in the indictment." Neither the majority nor the minority opinion of the Circuit Court of Appeals referred to these so-called "findings" as a support for denial of the motion to withdraw the plea of guilty. The Circuit Court of Appeals simply justified the denial on the ground that the motion was filed "far too late."

peals Rules, even if the motion had been made when petitioner first learned of her rights. Had the motion to withdraw the plea of guilty not been tardy, the court would have been required to consider it in the light of what this Court declared in *Kercheval* v. *United States*, 274 U. S. 220, 223: "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."[5]

It is suggested that some adverse inference should be drawn against the petitioner because she failed to try to appeal from her conviction and sentence following the denial of her motion. In view of her counsel's appointment solely for "the purpose of moving that she be allowed to withdraw her plea" of guilty, it is questionable whether he had authority to prosecute an appeal from her conviction and sentence. At least the appointed counsel did not take an appeal and he was the only lawyer petitioner had. Furthermore, the futility of an appeal based

[5] On this same subject see Orfield, Criminal Procedure from Arrest to Appeal (1947) at 300: "Since a plea of guilty is a confession in open court and a waiver of trial, it has always been received with great caution. It is the duty of the court to see that the defendant thoroughly understands the situation and acts voluntarily before receiving it." See also 4 Blackstone, Commentaries at 329: "Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment," and Bowyer, Commentaries on the Constitutional Law of England (1846) at 355: "The civil law will not allow a man to be convicted on his bare confession, not corroborated by evidence of his guilt, because there may be circumstances which may induce an innocent man to accuse himself."

upon the trial court's refusal to permit the withdrawal of her plea was obvious, in view of her failure to meet the strict requirements of Rule II (4). It seems pretty plain that the petitioner has raised the question here in the only proper way—by habeas corpus proceedings.

We accept the government's contention that the petitioner is an intelligent, mentally acute woman. It is not now necessary to determine whether, as the Government argues, the District Court might reasonably have rejected much of petitioner's testimony. Nor need we pass upon the government's contention that the evidence might have supported a finding that the FBI lawyer-agent did not actually give her the erroneous advice that mere association with criminal conspirators was sufficient in and of itself to make a person guilty of criminal conspiracy. For, assuming the correctness of the two latter contentions, we are of the opinion that the undisputed testimony previously summarized shows that when petitioner pleaded guilty, she did not have that full understanding and comprehension of her legal rights indispensable to a valid waiver of the assistance of counsel.

First. The Sixth Amendment guarantees that an accused, unable to hire a lawyer, shall be provided with the assistance of counsel for his defense in all criminal prosecutions in the federal courts. *Walker* v. *Johnston*, 312 U. S. 275, 286; see *Foster* v. *Illinois*, 332 U. S. 134, 136–137. This Court has been particularly solicitous to see that this right was carefully preserved where the accused was ignorant and uneducated, was kept under close surveillance, and was the object of widespread public hostility. *Powell* v. *Alabama*, 287 U. S. 45. The petitioner's case bristled with factors that made it all the more essential that, before accepting a waiver of her constitutional right to counsel, the court be satisfied that she fully comprehended her perilous position. We were waging total war with Germany. She had a Ger-

man name. She was a German. She had been a German countess. The war atmosphere was saturated at that time with a suspicion and fear of Germans. The indictment charged that while this country was at war with Germany and Japan the petitioner had conspired with others to betray our military secrets to Germany. She had been kept in close confinement since her arrest. Many of her alleged co-conspirators had already pleaded guilty. If found guilty, she could have been, and many people might think should have been, legally put to death as punishment for violation of the Espionage Act. If not executed, she could have been imprisoned for thirty years or for such shorter period as the judge in his discretion might fix. Even when the trial court was about to impose sentence on this petitioner following her plea of guilty, a lawyer might have rendered her invaluable aid in calling to the court's attention any mitigating circumstances that might have inclined him to fix a lighter penalty for her. Anyone charged with espionage in wartime under the statute in question would have sorely needed a lawyer; Mrs. von Moltke, in particular, desperately needed the best she could get.

Second. A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. See *Williams* v. *Kaiser*, 323 U. S. 471, 475. Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. Conspiracy charges frequently are of broad and confusing scope, and that is particularly true of con-

spiracies under the Espionage Act. See, *e. g.*, *Gorin* v. *United States*, 312 U. S. 19; *United States* v. *Heine*, 151 F. 2d 813. And especially misleading to a layman are the overt act allegations of a conspiracy. Such charges are often, as in this indictment, mere statements of past associations or conferences with other persons, which activities apparently are entirely harmless standing alone. A layman reading the overt act charges of this indictment might reasonably think that one could be convicted under the indictment simply because he had, in perfect innocence, associated with some criminal at the time and place alleged. The undisputed evidence in this case that petitioner was concerned about many of these legal questions—such as the significance of the overt act charges, and her possibilities of defense should all her co-defendants plead guilty—emphasizes her need for the aid of counsel at this stage.

Third. It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. *Johnson* v. *Zerbst*, 304 U. S. 458, 463; *Hawk* v. *Olson*, 326 U. S. 271, 278. This duty cannot be discharged as though it were a mere procedural formality. In *Powell* v. *Alabama*, 287 U. S. 45, the trial court, instead of appointing counsel particularly charged with the specific duty of representing the defendants, appointed the entire local bar. This Court treated such a cavalier designation of counsel as a mere gesture, and declined to recognize it as a compliance with the constitutional mandate relied on in that case. It is in this light that we view the appointment of counsel for petitioner when she was arraigned. This lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform

his duty. And it seems to have taken no longer. Even though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime. The hollow compliance with the mandate of the Constitution at a stage so important as arraignment might be enough in itself to convince one like petitioner, who previously had never set foot in an American courtroom, that a waiver of this right to counsel was no great loss—just another legalistic formality. We are unable to agree with the government's argument that the momentary appointment of the lawyer for arraignment purposes supports the contention that the petitioner intelligently waived her right to counsel. In fact, that court episode points in the other direction, for the judge then told the petitioner that he would appoint another lawyer "right away" for her—which he never did until long after she had pleaded guilty, too late to do her any good.

Fourth. We have said: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."[6] To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel,[7] a judge must investigate as long

[6] *Johnson* v. *Zerbst*, 304 U. S. 458, 465; see also *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 270.

[7] *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Glasser* v. *United States*, 315 U. S. 60, 70.

and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

This case graphically illustrates that a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel. And this case shows that such routine inquiries may be inadequate although the Constitution "does not require that under all circumstances counsel be forced upon a defendant." *Carter v. Illinois*, 329 U. S. 173, 174–175. For the record demonstrates that the petitioner welcomed legal aid from all possible sources; there would have been no necessity for forcing counsel on her.

Twice the court did designate counsel for petitioner. The first occasion was upon her arraignment. Petitioner appears willingly to have cooperated with this appointed counsel for the two or three minutes he was called upon to act. The second occasion was when counsel was named for the sole purpose of moving to withdraw her plea of guilty. Notwithstanding her unfortunate first encounter with court-appointed counsel and despite the fact that counsel was not designated the second time,

until it was obviously months too late to submit this motion under the procedural rules, there is no complaint that the petitioner failed to cooperate with him. And the record is filled with evidence from many witnesses that the petitioner persistently sought legal advice from all of the very limited number of people she was permitted to see during the period of her close incarceration before her plea of guilty was entered. It is apparent from the record that when she did plead guilty the slightest deviation from the court's routine procedure would have revealed the petitioner's perplexity and doubt. For the testimony of all the witnesses points unerringly to the existence of the uncertainty which was obviously just below the surface of the petitioner's statements to the judge.

Fifth. The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser* v. *United States*, 315 U. S. 60, 70. Before pleading guilty this petitioner undoubtedly received advice and counsel about the indictment against her, the legal questions involved in a trial under it, and many other matters concerning her case. This counsel came solely from government representatives, some of whom were lawyers. The record shows that these representatives were uniformly courteous to her, although there is no indication that they ever deviated in the slightest from the course dictated by their loyalty to the Government as its agents. In the course of her association with these agents, she appears to have developed a great confidence in them. Some of their evidence indicates a like confidence in her.[8]

The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, de-

[8] See note 3, *supra*.

voted service to a client are prized traditions of the American lawyer.[9] It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.

The admitted circumstances here cannot support a holding that petitioner intelligently and understandingly waived her right to counsel. She was entitled to counsel other than that given her by Government agents. She is still entitled to that counsel before her life or her liberty can be taken from her.

What has been said represents the views of MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE. They would therefore reverse the judgment of the Circuit Court of Appeals, set aside the prior judgment of the District Court and direct that court to grant the petitioner's prayer for release from further imprisonment under the judgment based on her plea of guilty. MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, for the reasons stated in a separate opinion, agree that the judgment of the Circuit Court of Appeals

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[9] American Bar Association, Canons of Professional and Judicial Ethics, Canon 15: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

Canon 4: "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

should be reversed, and that the District Court's prior judgment should be set aside, but they are of the opinion that, after setting aside its judgment, the District Court should further consider and make explicit findings on, the questions of fact discussed in the separate opinion.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is set aside. The cause is remanded to the District Court so that it may hold further hearings and give consideration to, and make explicit findings on, the questions of fact discussed in the separate opinion. If upon such further hearings and consideration the District Court finds that the petitioner did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel, an order should be entered directing that she be released from further custody under the judgment based on her plea.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1947.

Marianna von Moltke, Petitioner. *v.* A. Blake Gillies, Superintendent of the Detroit House of Correction.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 19, 1948.]

Separate opinion of Mr. Justice Frankfurter, in which Mr. Justice Jackson joins.

The appropriate disposition of this case turns for me on the truth of petitioner's allegation that she was advised by an F. B. I. agent, active in the case, that one who merely associated, however innocently, with persons who were parties to a criminal conspiracy was equally guilty.

We are dealing, no doubt, with a person of intellectual acuteness. But it would be very rare, indeed, even for an extremely intelligent layman to have the understanding necessary to decide what course was best calculated to serve her interests when charged with participation in a conspiracy. The too easy abuses to which a charge of conspiracy may be put have occasioned weighty animadversion by the Conference of Senior Circuit Judges. Report of the Attorney General, 1925, pp. 5–6; and see also the observations of Judge Learned Hand in *United States* v. *Falcone*, 109 F. 2d 579, 581; affirmed in 311 U. S. 205. The subtleties of refined distinctions to which a charge of conspiracy may give rise are reflected in this Court's decisions. See, *e. g.*, *Kotteakos* v. *United States*, 328 U. S. 750. Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes. Thus, as may have been true of peti-

tioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated, and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses. Accordingly, if an F. B. I. agent, acting as a member of the prosecution, gave her, however honestly, clearly erroneous legal advice[1] which might well have induced her to believe that she was guilty under the law as expounded to her by one who for her represented the Government, a person in the petitioner's situation might well have thought a defense futile and the mercy of the court her best hope. Such might have been her conclusion, however innocent she may have deemed herself to be. I could not regard a plea of guilty made under such circumstances, made without either the advice of counsel exclusively representing her or after a searching inquiry by the court into the understanding that lay behind it, as having been made on the necessary basis of informed, self-determined choice.

Of course an accused "in the exercise of a free and intelligent choice, and with the considered approval of the court . . . may . . . competently and intelligently waive" his right to the assistance of counsel guaranteed by the Sixth Amendment. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275; and see *Patton* v. *United States*, 281 U. S. 276, and *Johnson* v. *Zerbst*, 304 U. S.

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[1] This is the precise testimony: "That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy." The law, of course, is precisely to the contrary. *United States* v. *Falcone*, 311 U. S. 205, 210.

458. There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible. If the choice is beclouded, whether by duress or by misleading advice, however honestly offered by a member of the prosecution, a plea of guilty accepted without more than what this record discloses can hardly be called a refusal to put the inner feeling of innocence to the fair test of the law with intelligent awareness of consequences. Therefore, if the F. B. I. agent had admitted that the petitioner accurately stated his advice to her, or if the District Court upon a conflict of testimony had found that memory or truth lay with the petitioner, I could not escape the conclusion that the circumstances under which the petitioner's plea of guilty was accepted did not measure up to the safeguards heretofore enunciated by this Court for accepting a plea of guilty, especially where a sentence of death was at hazard.

On the record as we have it, however, I cannot tell whether the advice which, if given, would have colored the plea of guilty was actually given. If the unrevealing words of the cold record spoke to me with the clarity which they convey to four of my brethren, I should agree that the petitioner must be discharged. Conversely, if the District Court's opinion conveyed to me the findings which it radiates to my other brethren, I too would conclude that the judgment should be affirmed.

Unfortunately, the record does not give me a firm basis for judgment regarding the crucial issue of the F. B. I. agent's advice to the petitioner. It is not disputed that the agent, who was also a lawyer, did talk with her and did discuss legal issues with her. But he neither admitted nor denied whether, in the course of his discussions with her, he expounded the law so as hardly to leave her escape, however innocent under a correct view of the law she may have been. He did not even suggest

that even though he did not remember, he was confident that he could not have given her the kind of misleading legal information she attributed to him. On the contrary, he added that "it is quite possible that Mrs. von Moltke's memory is better than mine."[2] From the dead page, in connection with the rest of the agent's testimony, this suggests a scrupulous witness. But I cannot now recreate his tone of voice or the gloss that personality puts upon speech. Therefore I am unable to determine whether the petitioner pleaded guilty in reliance on the palpably erroneous advice of an F. B. I. lawyer-agent who, as the symbol of the prosecution, owed it to an accused in petitioner's position to give her accurate guidance, if he gave any.

Nor does the District Judge's opinion resolve these difficulties for me. From what he wrote it would be the most tenuous guessing whether he rejected the petitioner's account of the F. B. I. agent's counselling or whether he did not attach to that issue the legal significance which I deem controlling.[3] Since the record affords neither re-

[2] "Q. And did you [the F. B. I. agent] during that discussion use a [sic] illustration about a rum runner?

"A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

"Q. I see.

"A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration."

[3] The District Judge indicated abandonment of the charges that the "agents of the Federal Bureau of Investigation mislead [sic] her, or made promises to her that, which at least some degree, influenced her action in pleading guilty to the charge," but "for the purpose of the record" he stated "most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications." While it does appear, from the record, that petitioner abandoned her charge of coercion, there is nothing to buttress the suggestion that she abandoned the charge that she had been misled by the agent, and I therefore read the statement as referring to

solving evidence nor the District Court's finding on what I deem to be the circumstance of controlling importance, I would send the cause back to the District Court for further proceedings with a view to a specific finding of fact regarding the conversation between petitioner and the F. B. I. agent, with as close a recreation of the incident as is now possible.

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threats or promises to induce confession by the petitioner. The District Judge gave no intimation whatever that in his view the plea of guilty in connection with all the other circumstances could not be deemed to have been intelligently tendered, if in fact it was influenced by the F. B. I. agent's exposition of the law, as asserted by the petitioner. Nowhere is there a suggestion that although the agent was not prepared to say her memory of the interview was false or incorrect, the District Judge rejected her account.

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1947.

Marianna von Moltke, Petitioner, v. A. Blake Gillies, Superintendent of the Detroit House of Correction.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 19, 1948.]

Mr. Justice Burton, with whom The Chief Justice and Mr. Justice Reed concur, dissenting.

As the issues in this case are factual and deal largely with the credibility of witnesses, the binding force of this decision as a precedent is narrow. However, to guard against undue extension of its influence, a recorded dissent seems justified.

The Government does not contest the release of the petitioner if she establishes, as a matter of fact, that either her long considered and unequivocal plea of guilty in the original proceedings against her for violation of the Espionage Act or her written and otherwise clearly stated waiver of counsel in those proceedings was not freely, intelligently and knowingly made. The Government vigorously contends that she has failed in this proceeding to establish either of those facts. We agree with the Government. She has failed to do so and, having so failed, she is not entitled to release. The printed record does not require reversal of the judgment. The uniform findings of fact against her by the three trial judges who separately saw and heard her are amply sustainable.

The petitioner made her plea of guilty and filed her waiver of counsel in open court before District Judge Arthur F. Lederle on October 7, 1943. In November,

1944, after consideration and denial of her motion for leave to withdraw her plea of guilty, she was sentenced by District Judge Edward J. Moinet. She has made no direct attack on the judgment against her. Accordingly, before considering the exceptional burden of proof which she must bear in making a collateral attack upon that judgment more than a year after it was entered, it is well to examine the process of law which led up to this judgment.

At her arraignment, September 21, 1943, before District Judge Edward J. Moinet, she was assigned counsel to assist her during the arraignment. Such counsel advised her to stand mute. She did so. This conduct preserved her full rights and it has not prejudiced her position. A plea of not guilty was entered for her. This left her free to stand by it or to change it to a plea of guilty as she later did. There is no indication that other counsel could have done more for her than was done. She thus was made aware that the court would assign counsel to assist her. In fact she testified that, after the arraignment, "Judge Moinet said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away." This referred to the period after her arraignment.

In addition to this contact with the attitude of the court on the subject of counsel, she frequently discussed the subject of counsel with her husband. He himself had some legal education. She also talked with two lawyer friends of her husband who came to see her as friends, although not professionally. She likewise discussed her situation on many occasions with the representatives of the Federal Bureau of Investigation and occasionally with representatives of the United States Attorney. She repeatedly was urged by her husband not to do anything until she had consulted with an attorney. On the basis of this advice, she decided not to plead guilty on Septem-

ber 28, although several other defendants in the same proceeding had done so. She testified as follows about her husband's advice and about her decision of September 28:

"Q. He told you to get a lawyer?

"A. Yes; he said I should not [plead guilty] before I have seen an attorney; on such a question I should talk to an attorney first about the whole thing.

"A. My husband said to wait until a lawyer comes out.

"Q. And you decided not to plead guilty because of that?

"A. Because of that, yes."

Several days later she finally determined to plead guilty. On October 7, 1943, she expressly waived counsel, both in open court and in writing. As to this she later was asked on the stand:

"Q. So, during the week you decided to disregard the advice that your husband had given you?

"A. Yes, sir.

"Q. You made that decision; yes or no?

"A. Yes."

In other words, she had discussed her situation to her own satisfaction to the point where she had reached a conclusion both as to her plea of guilty and as to her wish to waive counsel. There is no constitutional provision that required or permitted counsel to be thrust upon her against her wishes. She had a right to decide that she did not want to discuss her case further with anyone. The issue was not then and is not now whether she might have been benefited by having counsel. She was an "intelligent, mentally acute woman" and, for reasons of

her own, she made up her mind that she wished to plead guilty and to waive counsel. If she did this freely, intelligently and knowingly, that was her right and that action should be final, subject only to a motion to withdraw her plea in regular course by due process of law or to appeal from the judgment rendered on her plea. Under the rules of the court, any withdrawal of her plea had to be made within ten days after entry of such plea and before sentence was imposed. Rules for Criminal Appeals, Rule II (4), 292 U. S. 662. This was not done. Judge Lederle, to guard against any misunderstanding, on October 7, 1943, specially inquired if she desired the assistance of counsel. She answered in the negative. He then inquired as to what her plea was. She answered guilty. In addition she submitted a written waiver of counsel. The court then deferred sentence and referred the case to the United States Probation Officer for investigation and report. Ample time was taken for this.

In June, 1944, she was taken before Judge Moinet, before whom she originally had been arraigned. She then advised him that she wished to change her plea. The judge informed her that she was entitled to representation by counsel and that an attorney ought to make a motion for permission to withdraw her plea and that, if she had a preference as to counsel, he would appoint such counsel as she desired him to appoint. The matter was left in abeyance while she tried to select counsel. On July 3, 1944, she wrote to Judge Moinet, advising him that she had no preference and the court soon thereafter appointed counsel for the purpose of making her motion. The assistance rendered by such counsel is not criticized. He secured from Judge Moinet not merely a ruling upon the procedural point as to the untimeliness of her motion, but also specific findings bearing upon its merits. This order made by Judge Moinet, about a

year after her arraignment before him, is significant because of its direct relation to the issue now before the Court. His order read as follows:

"This cause having come on for hearing upon the motion of the defendant Grafin Marianna von Moltke for leave to withdraw her plea of guilty, heretofore entered, and for leave to enter a plea of Not Guilty to the indictment filed herein, the matter after hearing, having been submitted, the Court, after consideration of said motion and of the arguments presented on behalf of the respective parties hereto, specifically finds:

"1. That the defendant Grafin Marianna von Moltke was properly advised of her constitutional rights by the Court, both prior to and at the time she entered her plea of Guilty to the indictment;

"2. That the plea of Guilty, entered several weeks after the filing of the indictment and her arraignment thereon, was submitted after due and careful deliberation;

"3. That the defendant was advised of and thoroughly understood the nature of the charge contained in the indictment filed in this cause;

"4. That no promises or inducements or threats were made for the purpose of obtaining the plea of Guilty, and that the entry of the plea of Guilty was not due to any misrepresentations;

"5. That the motion praying for leave to withdraw the plea of Guilty was not filed within the period fixed by Rule II (4) adopted by the Supreme Court of the United States of America;

"Wherefore, It is Ordered that the said motion to withdraw the plea of guilty entered by the defendant Graffin [Grafin] Marianna von Moltke in the above entitled cause, be and the same is hereby denied."

This was in November, 1944. Judge Moinet asked the defendant whether she had anything to say why judgment should not be pronounced against her, and, no sufficient reason to the contrary being shown or appearing to the judge, he sentenced her to imprisonment for four years. She began serving her sentence. However, after a determination had been made by the Government in 1945, looking toward her removal and repatriation to Germany, she, in 1946, filed a petition for *habeas corpus* making the present collateral attack on the original proceedings. We, therefore, are asked to review here the factual findings of the District Court made in April, 1946, through District Judge Ernest A. O'Brien in this *habeas corpus* proceeding and, by way of collateral attack, to review the action of the same District Court, taken in the original proceeding through Judge Lederle in October, 1943, and through Judge Moinet in November, 1944. While such proceedings by *habeas corpus*, based on constitutional grounds, are vital to the preservation of individual rights, the protection of our judicial process against the making, in this way, of unjustified attacks upon such process is equally important to the preservation of the rights of the people as a whole. Each attempted attack calls for the careful weighing not only of the claims made, but also of the proof submitted to sustain each claim.

In now attacking collaterally the unappealed and deliberate judicial proceedings of 1944, a heavy burden of proof rests upon the petitioner to establish the invalidity of her original plea and waiver. The essential presumption of regularity which attaches to judicial proceedings is not lightly to be rebutted. *Johnson* v. *Zerbst*, 304 U. S. 458, 468–469; *Hawk* v. *Olson*, 326 U. S. 271, 279. Judge O'Brien recognized the strength of this presumption and the heavy burden of proof to be borne by the petitioner. He therefore held extended hearings at which the petitioner and many others appeared as wit-

nesses. The evidence included a substantial showing that the trial judge in accepting the petitioner's plea of guilty in the original proceeding had done so only after satisfying himself, by careful questioning, that the plea was not the result of threats or promises and that, with knowledge of her right to counsel, the petitioner had voluntarily waived that right.[1] At the conclusion of these hearings Judge O'Brien found not only that the petitioner had failed to sustain the burden resting upon her, but that the overwhelming weight of the evidence in these proceedings was against her.

His statement as the trial judge in the *habeas corpus* proceedings is impressive and entitled to great weight here:

> "In the petition filed in this cause the petitioner directly or by implication charges that the District Attorney having the case in charge and agents of the Federal Bureau of Investigation mislead [misled] her or made promises to her that, which at least [in] some degree, influenced her action in pleading guilty to the charge. I am of the opinion that these charges have now been abandoned by the petitioner but for the purpose of the record I wish to state most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications. The conduct of both the officials of the District Attorney's office and the agents of the Federal Bureau of Investigation were meticulous in safeguarding the rights of the petitioner and that the record is utterly bare of any support of petitioner's contentions.
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> "The petitioner is a woman obviously of good education and above the average in intelligence. Her knowledge of English was fluent and ample. She had

[1] See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 276–277.

discussed the case with various people before the plea of guilty was entered. In fact, at her own request she had a conference with the chief assistant district attorney wherein she endeavored to secure from him some promises of leniency and convenience as an inducement to a plea of guilty. These advancements by the petitioner were, of course, repudiated by the district attorney and she was informed of the officials who had jurisdiction over the matter in advent [the event] of her plea of guilty.

"The chief contention of the petitioner was that her waiver of her right to counsel was not competently and intelligently made. The plea was taken before Judge Arthur Lederle of this District. The evidence showed that the Judge inquired of her if she understood the charges made in the indictment. She answered in the affirmative. The Judge inquired if she desired the assistance of counsel. She answered in the negative. The Judge then inquired what was her plea. She answered guilty. In addition to this she submitted a signed waiver stating that she did not desire counsel.

"The only substantial question in this case is whether the petitioner intelligently and knowingly waived her constitutional rights. It was her obligation to sustain the allegations of her petition by a preponderance of evidence. Not only has she failed in this but I believe that the evidence is overwhelming against her contentions. The petitioner is an intelligent, mentally acute woman. She understood the charge and the proceedings. She freely, intelligently and knowingly waived her constitutional rights. I conclude, therefore, that there is no merit in her petition and that it shall be dismissed together with the writ."

The Circuit Court of Appeals affirmed the judgment dismissing the petition for the writ of *habeas corpus*. That judgment is now brought here and we are called upon to make a further review of the factual conclusions of the District Court in the *habeas corpus* proceedings.

Due process of law calls for an equal regard by us for the interests of the Government and of the petitioner in seeking the nearest possible approximation to the truth. Necessarily we have only the printed record here. On the other hand, the trial judge, faced by the same issues, heard spoken the words we now read. He saw the original instruments that we now see reproduced. He observed the conduct and expressions of the petitioner and of the other witnesses whereas we cannot make an informed independent conjecture as to such conduct or expressions. From the living record he found the factual issues overwhelmingly against the petitioner.

There is nothing in the printed record sufficient to convince us that, if we had seen the witnesses and heard the testimony, we would not have reached the same conclusion. Much less is there anything in it that convinces us that, not having seen or heard it made, we are justified in reversing his findings which were based upon more than can be before us. Under the circumstances, we believe that the truth is more nearly approximated and justice is more surely served by reading the printed record in the strong light of the trial judge's factual conclusions than by attempting to interpret that record without giving large effect to his conclusions as to its credibility and to the inferences he has drawn from it. The aid to the ascertainment of the truth to be derived from the trial court's impartial observation of the witnesses should not be dissipated in the process of review. His appraisal of the living record is entitled to proportionately more, rather than less, reliance the further the reviewing court is removed from the scene of the trial. See *District of Co-*

lumbia v. *Pace*, 320 U. S. 698, 701; *United States* v. *Johnson*, 319 U. S. 503, 518; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367; *Delaney* v. *United States*, 263 U. S. 586, 589–590.

Her status as an enemy alien does not, in itself, affect her right to counsel or the informed character of her plea of guilty and her waiver of counsel. The fact that the charge against her was under the Espionage Act and therefore carried a technical possibility of the death penalty did not at any time introduce a practical consideration that she was in actual danger of suffering capital punishment. She accurately forecast the general character of her sentence and was concerned primarily with the wish that her sentence be served near her family. An assistant district attorney stated that he would write a letter recommending that she be imprisoned close to her family.

While a conspiracy is exceptionally difficult to define in all its legal and factual complexities, there is nothing in the Constitution that prevents an accused from freely, intelligently and knowingly choosing to plead guilty to that, as well as to other complex charges, for reasons best known to the accused, as an alternative to standing trial on that charge. This was her right. Having thus positively decided not to stand trial she did not require counsel in order freely, intelligently and knowingly to waive counsel.

Our Constitution, Bill of Rights and fundamental principles of government call for careful and sympathetic observance of the due process of law that is guaranteed to all accused persons, including enemy aliens like the petitioner. The Constitution, however, was adopted also in order to establish justice, insure domestic tranquility, promote the general welfare and secure the blessings of liberty to the people of the United States as a whole. To that end, it is equally important to review with sympathetic understanding the judicial process as constitution-

ally administered by our courts. While the majority of this Court are not ready to affirm the judgment below on the record as it stands, their decision to remand the case for further findings does not mean that established and salutary general presumptions in favor of the validity of judicial proceedings and in favor of a trial court's conclusions as to the credibility of witnesses are to be relaxed.